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The suggestion of the CENTRAL LAW JOURNAL, in its issue of November 29, 1901 (53 Cent. L. J. 421), in regard to the refusal of executives of certain states to recognize the requisitions for the extradition of fugitives from justice from executives of sister states, has just been adopted in a bill presented to congress December 13, 1901, and referred to the judiciary committee. We made a thorough examination of the subject at that time, and are absolutely convinced that the remedy suggested, and which is adopted in this bill, is the only solution for those unhappy and serious clashes of authority between the governors of sister commonwealths. This subject is not a political one, but is one in which every lawyer and every citizen is vitally interested. The bill is number 5827, and was introduced by Mr. Robinson, of Indiana, through whose courtesy we are in receipt of a copy thereof. Its object is to amend section fifty-two hundred and seventy-eight of the Revised Statutes of the United States on extradition. The section amended by this bill would read as follows:

"Whenever the executive of any of the states or territories demand any person as a fugitive from justice of the executive of any other state or territory to which such person has fled, and produces a copy of an indictment found in an affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appear within six months from the time of the arrest the person may be discharged. If the governor or executive authority of any state or territory to which such fugitive person has fled shall refuse the demand of the governor or executive authority of the state from which said fugitive fled, as above provided, then the governor or executive of the state from which said fugitive fled may issue his warrant of arrest to any marshal of the United States commanding him to arrest and bring forthwith before the court having jurisdiction of the offense the said fugitive from justice. There shall be attached to said warrant a copy of an indictment found or an affidavit made before a magistrate in said state or territory to which said warrant is issued charging the person demanded with having committed treason, felony, or other crime, and certified as authentic by the governor or chief magistrate of said state.

"The said warrant when so issued shall authorize any marshal of the United States to arrest and secure said fugitive in the said state or territory to which he fled and to bring him back into the state or territory from which he fled."

That this is a most excellent and necessary step in advance is obvious to every one acquainted with the present facts and conditions. Of recent years there has been a tendency among governors to refuse the rendition of fugitives from justice for certain political crimes or for offenses charged to enforce financial obligations and on various other grounds which they have alleged as "ulterior," thus laying themselves open to the charge of acting in the face of the constitution and of the decision of the supreme court, denying them any discretion in such matters. We heartily indorse this bill as a happy solution to a most difficult problem of American constitutional law.

NOTES OF IMPORTANT DECISIONS

TRIAL AND PROCEDURE—IMPROPER ARGUMENT OF COUNSEL.—Attorneys in their zeal to promote their client's interests, often overstep the bounds of reason and fairness in their statement of the case and argument to the jury. But, as a general rule, such arguments or statements, even if objectionable, will not be ground for a new trial unless some substantial right of the opposing party has been affected. Such was the decision in the recent case of Watson v. Southern Oregon Co., 65 Pac. Rep. 985, where the Supreme Court of Oregon held that the reading of an opinion in a former case by counsel while

discussing a proposition of law, in which no question decided was material in the pending trial, is not error in the absence of a showing that counsel acted in bad faith, or that the reading improperly influenced the jury. And also that the fact that a court considered statements made by counsel of plaintiff prejudicial to defendant, and sufficient to justify granting a new trial, unless plaintiff remitted a part of the verdict, does not make such statements assignable as error on appeal, in the absence of an objection by defendant's counsel thereto.

VERDICT — MISCONDUCT OF JURY IN ARRIVING AT A VERDICT. — One of the most serious questions of legal procedure which is perplexing courts and lawyers alike, is the gross misconduct of jurors in arriving at a verdict in the most important civil suits, which, if the litigation on this question is any criterion, is growing with alarming rapidity. Indeed, trial by jury in civil cases, where large financial and business interests are involved, is not to be commended, and litigants in such cases generally waive a jury and leave the matter to the discretion of the trial judge or to a commission of referees, who are especially versed in the subject of controversy. Some juries seems to have a very low conception of the importance of a verdict. A verdict has been very correctly defined as the unanimous decision made by a jury and reported to the court, on matters lawfully submitted to them in the course of the trial of a cause, and should be the result of sound judgment, dispassionate and conscientious consideration. Litigants in a cause before a jury are entitled to the free, deliberate, unbiased and conscientious judgment of twelve jurors, and a verdict should not be permitted to stand which has been brought about by any undue or improper influences, or made to depend upon any contingent result. In the recent case of Williams v. Pressler, 65 Pac. Rep. 934, a jury, after deliberation for a reasonable time, stood three for the defendant and nine for the plaintiff, and the three who were favorable to the defendant signed a written agreement to the effect that they would find for the plaintiff if the other nine would sign a written statement to the effect that they believed the defendant had willfully testified to a lie, and the other nine, in order to induce the three to agree with them, did prepare and sign a written statement wherein they stated that they believed that the defendant did willfully and knowingly swear falsely in the case then before them, and on this being done the jury returned a verdict for the plaintiff. The Supreme Court of Oklahoma held that such verdict was not the result of free, deliberate and unbiased judgment, and should be set aside.

Among the cases bearing on this question is that of Ryerson v. Kitchell's Executors, 3 N. J. Law, 998. In that case, the jury, after deliberating for some time, and being unable to agree, agreed to leave it to two of the jurors to go by themselves and agree, and, if the two could not agree, then the two were to select a third juror as umpire; and the two, failing to agree, selected the third, and these three agreed to find no cause of action. The jury then returned a verdict in conformity to the finding of these three jurors. The court said, "This transaction was unlawful, and the judgment rendered on a verdict obtained in this manner cannot be supported." Other authorities supporting the court in the principal case on the general proposition might be mentioned as follows: Merserve v. Shine, 37 Iowa, 253; Richardson v. Coleman, 131 Ind. 210, 29 N. E. Rep. 909, 31 Am. St. Rep. 429; Randolph v. Lampkin, 90 Ky. 551, 14 S. W. Rep. 538, 10 L. R. A. 87; Henderson v. State, 12 Tex. 532; Knight v. Fisher. 15 Colo. 176, 25 Pac. Rep. 78; Donner v. Palmer, 23 Cal. 40; Burke v. Magee, 27 Neb. 156, 42 N. W. Rep. 890; Lee v. Clute, 10 Nev. 149.

IMPROPER REMARKS AND CONDUCT OF TRIAL JUDGES AS REVERSIBLE ERROR.

When a case is submitted to the court, what the judge says and does that would be extremely prejudical before jurors has, in their absence, no evil effect on any party to the suit. Even the party complaining cannot object that notice is given of the court's attitude or opinion. When, however, a case is being tried before a jury there are two judicial bodies, a judge of the law and judges of the facts. Neither has a right to invade the province of the other. As a consequence improprieties of speech or conduct on the part of the trial judge are ordinarily assigned as error on the ground that the jurors were influenced thereby, or, in other words, that the judge did not properly respect the province of the jury.

There is not unanimity in judicial decisions on the subject of the respective provinces or functions of the judge and the jury. The rule of the federal courts is familiar. They refuse to follow the statutes and decisions prevailing in a majority of the states, and hold that the expression of an opinion by the judge in submitting the case to the jury, when no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on a writ of error.[1] There are decisions by state courts of review, particularly in New York and Pennsylvania, that give to trial

[1] Doyle v. B. & A. R. Co., 27 C. C. A. 264, 82 Fed Rep. 869; Railroad Co. v. Putnam, 118 U. S. 545, 553

judges the right of expressing opinions on facts. Justice Gaynor, of the New York Supreme Court, recently used emphatic language in advocating what would practically be the adoption of the federal rule in the state courts.[2] The learned justice in his opinion refers to what he terms the vogue of certain counsel "whose uppermost idea seems to be that the business of trial judges is only to help the tip staffs keep order while the jury tries the case," and that the judge "is placed in such a state of tutelage and subjection under our present system that he may say nothing that is not colorless and apologetic." Later, in the opinion, he says: "I prefer to believe that the constitution and laws have not reduced trial judges to any such humiliating position in this state. It seems to me that it has always been recognized as wholesome in this state, the same as in England, that trial judges should feel free to exercise full control over the trial of causes, and, to speak plainly, especially in the presence of trickery and fraud. It is that which kept the jury system so high in England. Honest litigants and honorable and learned counsel expect it and want it, and are entitled to the protection of it. Our highest court has carefully guarded this function of the trial judge and refrained from infringing upon it, though often invited to do so." This is a fair and able presentation of the views of those advocating for trial judges "full control" of jury trials, but with all due respect for the opinion of the writer, it is proper to state that his position is not being commonly adopted in this country. The tendency is to guard carefully the province of the jury as judges of facts, and to deny to the court the privilege of expressing opinions thereon, and even in jurisdictions where the court is allowed to express an opinion on the facts, it is held to be his duty to instruct the jury that they are not bound thereby.

When those statutes are considered which provide, in substance, that judges shall not give opinions on facts, as this is the true office and province of the jury, it cannot consistently be claimed that, as a general rule, "honest litigants" desire exactly the opposite. Surely these statutes were not enacted wholly by dishonest litigants or in their favor. Such laws are an evidence of the importance attached to preserving jury verdicts free from prejudice or improper influence, and the remarks and conduct of *nisi prius* judges are erroneous when they have such an effect.

In an opinion written by Justice Grant the Supreme Court of Michigan declares itself on this subject, in substance, as follows: Appellate courts must presume that one occupying so important a position as that of a circuit judge can influence a jury, and whenever he expresses an opinion on any disputed fact, or of the character of a witness, or compliments one attorney at the expense of another, or uses language which tends to bring an attorney into contempt before the jury, or uses any language which tends to prejudice, then he commits an error of the law for which the verdict and judgment must be properly set aside.[3] The decisions are numerous which hold that any improper remark of the trial judge, in the presence and hearing of the jury, liable to influence their action, is misconduct, and reference is here made to those of this purport subsequently herein cited. The late Justice Cooley held that even the demeanor of a trial judge could be assigned as error because of its improper influence on the jury.[4] Speaking with reference to the remarks of trial judges Judge Gary, of Chicago, in an opinion delivered when a justice of the appellate court of Illinois, said, characteristically and forcibly: "One of the greatest difficulties of a *nisi prius* judge is to keep his mouth shut. I had twenty-five years' experience of it. * * * Many judgments have been reversed in this state because the judge talked too much."[5] In a recent Pennsylvania case, after a trial of several weeks, the jury had been out two days, when the court told them that if they did not agree he would keep them together for weeks, and people would suspect them of corruption. When the case reached the supreme court Justice Dean called attention to the intelligence of the jury, and in a measure outlined the duty of the court by saying that what the jurors needed was the lawful, patient and kindly aid of an able judge, while instead of this there was a complete obliteration of the dividing line between the

[2] Baker v. Riedel, 52 N. Y. Supp. 832.

[3] McDuff v. Journal Co., 84 Mich. 1.

[4] Wheeler v. Wallace, 53 Mich. 355.

[5] Kane v. Kinnare, 69 Ill. App. 81.

functions of court and jury, and in this connection the justice quotes the quaint words of Chancellor Bacon to Justice Hutton: "That you be a light to jurors to open their eyes, but not a guide to lead them by the noses."[6]

The jurors are the judges, and the sole judges of the facts, and of the weight and credit which ought to be given to the testimony of the witnesses. Parties are entitled to a decision on the facts by the jury, uninfluenced by the opinion of the trial judge, and any remarks or conduct on his part denying or impairing these rights is error.[7]

Error Without Prejudice Will Not Reverse.—In cases of the character under discussion, as in other cases, error will not be cause for reversal unless there is resulting prejudice. This a common rule and one frequently of great comfort, especially to appellees. Granting that the judge has spoken or acted in an improper manner, if the appellant or plaintiff in error was not injured thereby, he has no ground to complain. This is a case with remarks which are of doubtful propriety; as where at the close of the plaintiff's evidence the court said that there should be a recovery unless a defense was put in, it appearing by the verdict that the defendant was not prejudiced by the remarks;[8] and where the court made improper remarks to counsel and also handed the jury a calculation, but at the same time told them to compute their finding from the evidence.[9] Similar rulings have been made in instances of inadvertent remarks by the court, which, while not proper, the results showed did not mislead the jury.[10]

A remark concerning land measurements, that they were made "by a baker, attended by a tinsmith, under the supervision of a lawyer," was held not to call for a reversal,[11] and so in the case of a comment on certain evidence that "it is not very material but it may go to the jury," where the testimony in fact had slight bearing, if any, on the case.[12] The practice of informing the jury of the ultimate results of their answers, when questions are submitted for special verdict, is not commended but it is not regarded material error.[13] In each of the two cases the trial judge committed errors almost identical, interrupting defendant's counsel and telling the jury to take the law from the court or they would be guilty of contempt and could be punished; one case was affirmed because the verdict could not have been different and also right; the other was reversed because of a different result, prejudice appearing in the verdict.[14] If the trial judge makes erroneous remarks and subsequently realizing his mistake properly instructs the jury relative thereto, the evil may be remedied in the same manner as evidence improperly received is afterwards stricken out.[15] In determining whether or not the court's remarks were improper and prejudicial, courts of review will take into consideration the context and the circumstances under which they were uttered.[16]

Expressions of Opinion on the Facts or Evidence.—An application of the rule stated above, that error without resulting prejudice will not reverse, comes far from disposing of the subject under discussion by its division of the cases into two classes, those in which there is resulting prejudice, and those in which there is none, for the fact of the presence or absence of prejudice is itself a subject of inquiry, and it becomes necessary to determine what is regarded by courts of review as prejudicial error relative to the remarks or conduct of trial judges. In harmony with the principle that it is the

[6] Miller v. Miller, 187 Pa. 572.

[7] Dunn v. People, 172 Ill. 594.

[8] Skelly v. Boland, 78 Ill. 438; State v. Holedger, 15 Wash. 443; State v. Richard, 72 Iowa, 17; Merchants' Bk. v. Ortmann, 48 Mich. 419; Sickler v. Town of La Valle, 65 Wis. 572.

[9] Williams v. Lumber Co., 118 N. Car. 928.

[10] State v. Ashbell, 57 Kan. 398; People v. Yokum, 118 Cal. 437; A., T. & S. F. R. Co. v. Hamilton, 6 Kan. App. 447; Chicago, etc. Ry. Co. v. Blume, 137 Ill. 452; Beasley v. People, 89 Ill. 571; Chalk v. State, 35 Tex. Crim. Rep. 116; Kirchlighter v. Little, 105 Ga. 500; Schintz v. People, 178 Ill. 320.

[11] Omensetter v. Kemper, 6 Pa. Super. Ct. Rep. 309. See also Silber v. Larkin, 94 Wis. 9, and McLeod & Co. v. Wilson Bros., 108 Ga. 790.

[12] McGee v. State, 37 Tex. Crim. Rep. 668.

[13] Bauer v. Richter, 103 Wis. 412.

[14] Hoey v. Fletcher, 39 Fla. 325; Price v. Carter Bros. & Co., *Id.* 362.

[15] Klinker v. Third Ave. R. Co., 49 N. Y. Supp. 793; Chesebrough v. Conover, 140 N. Y. 382, 389, 35 N. E. Rep. 633.

[16] Lamb v. Lippencott, 115 Mich. 611. The rule that resulting prejudice is necessary to occasion reversal is applied in the following cases, among others, concerning improper remarks of counsel: Tunnicliffe v. Bay Cities Con. Ry. Co., 107 Mich. 261; Sabine v. Merrill, 67 N. H. 226; Roose v. Roose, 145 Ind. 165; C. & A. R. Co. v. Dillon, 123 Ill. 578; Harms v. Steir, 67 Ill. App. 634.

jury's province to pass judgment upon the facts and upon the character and sufficiency of the evidence, a general doctrine of appellate courts is, that it is reversible error if the misconduct of the presiding judge in invading this province of the jury by an expression of an opinion, results in prejudice. In McDowell v. Crawford,[17] Justice Moncure quotes approvingly 1 Rob. Prac. 338, 344, where the cases are collected, and says: "They evince a jealous care to watch over and protect the legitimate powers of the jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that when the evidence is parol any opinion as to weight, effect or sufficiency of the evidence submitted to the jury, any assumption of a fact as proven or even intimation that written evidence states matters which it does not state, will be an invasion of the province of the jury." Justice Green, in State v. Hurst,[18] referring to the above, says that if such is the case in civil cases there are much stronger reasons why it would be error to make such remarks in the trial of a criminal case. The jury have high regard for those occupying the positions of judges, and are attentive to the slightest indications of their opinions, and it is therefore improper that the same should be expressed plainly by word or act in such a way as to influence the jury. It has been held accordingly, without regard to state statutes, that it is reversible error for the court to express an opinion as to disputed facts, the weight of evidence, its credibility or what it proves.[19] There have been reversals on this account in the following illustrative cases: Where the judge said: "This is a civil suit, but if the jury considered the evidence detailed before them they would find the case decidedly criminal;"[20] where when the jury returned after retiring and asked if the defendant was being prosecuted for a certain offense, the judge said, "Yes, and that is what is proven;"[21] in a case to recover a subscription to a county map, the judge saying that he did not know as he would recognize the views of the defendant's house;[22] in a robbery case where the court said, "Do you mean to say, sir, that there is no evidence here to show the guilt of the defendant? I say there is evidence;"[23] where the judge said that the evidence warranted a remark of the district attorney that the defendant and those arrested with him were thieves;[24] where the judge said "I believe that is the same can," in reference to an identification of an oil can, the point being important;[25] where on a trial for false imprisonment the judge remarked: "They are liable and I will so charge the jury, and this testimony may enormously enhance the damages," such remarks shutting off the defense of probable cause and advice of attorney;[26] and where the court read a printed report of a case and said that he adopted the opinion thereof, as he could in no more effective way indicate his opinion as to the effect of the evidence in the case on trial.[27] These expressions of opinion by trial judges are frequently so positive and decided that the error is not remedied by subsequent cautions or instructions to the jury, as where in an action by a female for an assault, the court said that the matter should be taken before the grand jury;[28] where the judge said, "There is as much testimony that the defendant had kicked the deceased upon the chest as upon the face;"[29]

[17] 11 Gratt. 405.

[18] 11 W. Va. 51.

[19] Hine v. Commercial Bk., 119 Mich. 448; Wilkinson v. Searey, 76 Ala. 176; Wannack v. Mayor, etc., 58 Ga. 162; Hair v. Little, 28 Ala. 236; State v. Philpot, 97 Iowa, 365; Kirk v. State, 35 Tex. Crim. Rep. 224; Artz v. Robertson, 50 Ill. App. 34.

[20] Furhman v. Mayor of Huntsville, 54 Ala. 263.

[21] Lawson v. State (Tex. Crim. App.), 32 S. W. Rep. 895.

[22] Andreas v. Ketchum, 77 Ill. 377.

[23] Feinburg v. People, 174 Ill. 609.

[24] Scott v. State, 91 Wis. 552.

[25] Marzen v. People, 173 Ill. 56, 58.

[26] Bennett v. Eddy, 120 Mich. 300, 6 Det. L. N. 159, 79 N. W. Rep. 481.

[27] Herman Co. v. Williams, 36 Fla. 136. For other cases on improper expressions of opinion by judges, see Burrows v. Delta Trans. Co., 106 Mich. 582, 29 L. R. A. 468; I. C. R. R. Co. v. Souders, 178 Ill. 585, reversing 79 Ill. App. 41; Cone v. Citizens' Bk., 4 Kan. App. 470; Murphy v. State (Tex.), 57 S. W. Rep. 967; Walker v. Coleman, 55 Kan. 381; Kennedy v. People, 44 Ill. 283; McCullar v. State, 36 Tex. Crim. Rep. 213. While it would be outside the purview of this article to discuss instructions, generally, it may properly be said in this connection that it is error to indicate an opinion in an instruction. Frame v. Badger, 79 Ill. 441. In City of Chicago v. Spoor, 190 Ill. 353, it is held to be error for the judge to say concerning a photograph, "it is for the jury to say how much stock they take in testimony of that kind."

[28] Davison v. Herring, 48 N. Y. Supp. 760.

[29] State v. Harkin, 7 Nev. 377.

and where the court said: "I mean to throw this action out of court the first opportunity."[30] In deciding Brooks v. Railroad Co.,[31] Justice O'Brien says, with reference to certain misstatements of the trial judge concerning what occurred at a former trial between the same parties: "It will not detract in any degree from the high character of the learned judge to say that he did not at the moment fully appreciate the importance of his remarks or the probable influence which would be given to them by the jury. He was about to submit to them a disputed question of facts upon the evidence and he virtually threw into the scale against the defendant all the weight of his impartial position and unbiased recollection upon that very question. There was no longer any chance for the defendant to succeed at least upon that issue." Reversals will not be occasioned by remarks of the trial judge, which, while improper, are not prejudicial; are not a comment on the testimony or an intimation of an opinion; are made with the consent of parties or counsel; are of such a character that all evil connected therewith is cured by subsequent instructions to the jury; or are no more than necessary in making a ruling.[32]

Commenting on the Credibility of Witnesses.—Equally serious and prejudicial with the error of the judge's expressing an opinion on the evidence is that of his passing judgment on the credibility of the witnesses, which is an office or function within the province of the jury. These two errors are similar in nature and effect. In a comparatively recent case the Supreme Court of Florida said, speaking of an assignment of error occasioned by a remark of the trial judge, to the effect that he was not responsible for the trouble that the witnesses had gotten themselves into: "We have repeatedly held that remarks of the judge during the trial as to the credibility of a witness or as to the weight of any evidence relevant to the issue, are an improper assumption of, or infringement upon, the province of the jury, and when duly excepted to by the party injured they may be assigned as error and constitute ground for reversals."[33] And so where the trial judge imputed improper motives to the defendant's witnesses and disparaged their testimony; where he said "stop quibbling," thus implying that the witness was evading the truth; where he said that the witness had not observed with the closeness he thought he had, and in similar instances in which the testimony of the witnesses was of importance the appellate courts have reversed the cases on these grounds.[34]

It is improper for the judge to comment on the "unquestioned integrity" or the respectability of a witness, praise being no more proper than criticism.[35] The credibility of one who has turned state's evidence is for the jury, and the court should do no more than call attention to such testimony.[36] A common way in which *nisi prius* judges err in relation to indicating their opinions of the credibility of the witnesses, is by taking in hand the examinations, propounding the questions extensively and on important points, a practice which the decisions generally concur in condemning, while they admit the propriety on the part of the judges of asking questions on material points, not brought out plainly before the jury. On this subject the Supreme Court of Illinois, through Justice Bogg, in Dunn v. People,[37] said: "It is a task of great delicacy and much difficulty for a presiding judge to so conduct the examination of a witness that nothing, either in the tone or inflection of the voice, the play of the features, the manner of propounding or framing the question, or the course of investigation pursued in the examination, will

[30] Swan v. Keough, 54 N. Y. Supp. 474. See also People v. Corey, 157 N. Y. 332; Brooks v. Rochester Ry. Co., 156 N. Y. 244, 252.

[31] 156 N. Y. 252.

[32] Hackman v. Gutweiler, 66 Mo. App. 244; State v. Barnes, 48 La. Ann. 460; Farley v. Gate City Gas Co., 105 Ga. 323; Frank v. Davenport, 105 Iowa, 588; State v. Simmons, 51 N. Car. (6 Jones, L.) 21; Penn. Co. v. Coulan, 101 Ill. 93; Bradbury v. McHenry (Cal.), 57 Pac. Rep. 999; Mut. Life Ins. Co. v. Selby, 19 C. C. A. 331, 73 Fed. Rep. 980; Van Lehn v. Morse, 16 Wash. 219.

[33] Roberson v. State, 40 Fla. 509.

[34] People v. Hill, 56 N. Y. Supp. 282; People v. Nino, 149 N. Y. 324; Rose v. State, 13 Ohio, C. C. 342; Valley Lumber Co. v. Smith, 71 Wis. 304; State v. Jacob (S. Car.), 8 S. E. Rep. 698; McDonald v. Fort Dearborn Nat. Bk., 72 Ill. App. 17; Williams v. West Bay City, 119 Mich. 395; Swenson v. Erickson, 90 Ill. App. 358; Symon v. People, 188 Ill. 609, 59 N. E. Rep. 508.

[35] McMinn v. Whelan, 27 Cal. 300; State v. Staley, 45 W. Va. 792-804.

[36] People v. Hare, 57 Mich. 505; People v. Lyons, 49 Mich. 78.

[37] 172 Ill. 582.

indicate to the jury the trend of the mind of the questioner. An extended examination of a witness by the court must be unfair unless it partakes partly of the nature of a cross-examination, and though great skill and tact and perfect fairness be employed there is much danger that the impression or opinion of the court as to the truthfulness, candor and reliability of the witness and as to the weight and value of his testimony, will be manifested to the jury. Though at times the court may, by an opportune and carefully considered question, elucidate a point, aid an embarrassed witness or facilitate the progress of a trial without in any degree influencing the jury or arousing distrust in the minds of the parties of their attorneys, yet the examination of witnesses is the more appropriate function of the counsel, and it is believed the instances are rare and the conditions exceptional in a high degree which will justify the presiding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action necessary or advisable."[38] There are, however, numerous decisions which uphold the general control by the judge of the examination of witnesses and his right to elicit the whole truth that justice may be done.[39] The point is one to which the doctrine above announced relative to resulting prejudice is pre-eminently applicable. It is certainly the judge's duty to do all he can to further just interests and to examine witnesses if necessary to this end, providing his examinations are not the cause of improper prejudice. Following principles and rules, that have already been discussed, reviewing courts do not reverse cases on account of the direct or indirect comment or reflection of the trial judges upon the credibility of witnesses in instances where no prejudice resulted, as where the testimony was unimportant, substantial justice was done or the error was remedied by instructions.[40]

Interfering With the Rights of Parties and Counsel.—The parties to a suit and the counsel representing them have rights with which it is error for the judge to interfere. Nothing should be said by him that can be construed to the prejudice of either party, and moreover it is the judge's duty to repress needless attacks on the characters of the parties.[41] It is also held error to disparage an attorney in the eyes of the jury, as this course occasions prejudice. An attorney is an officer of the court and is entitled to such treatment by the court as the interests of the client demand, and should not be made the object of such remarks as "Your brain seems to be out of order;"[42] but if an attorney is, as matter of fact, trifling with the court, it is not improper for the latter to say so.[43] Counsel have rights of arguments and cross-examinations that on account of their client's interests should not be denied.[44]

Communications Between Judge and Jury.—So carefully do courts in their opinions guard the impartiality, purity and regularity of verdicts, that communications on the part of trial judges with the jury after their retirement for deliberation, except to modify or supplement the instructions, are regarded with disapproval. It has been said that the history of the law discloses a struggle for centuries to prevent juries from being ap-

[38] Wheeler v. Wallace, 53 Mich. 355; Riegler v. Tribune Assn., 58 N. Y. Supp. 807; Schmidt v. St. L. R. Co., 149 Mo. 269, in which case the judge made improper remarks concerning the conduct and testimony of a girl fourteen years old; Sharp v. State, 51 Ark. 147; McMinn v. Whelan, 27 Cal. 300; People v. Dick, 34 Cal. 663; Omaha Brew. Assn. v. Bullnheimer, 58 Neb. 387; People v. Abbott, 101 Cal. 645; Kramer v. Riss, 77 Ill. App. 623; Harrell v. State, 39 Tex. Crim. Rep. 204. In State v. Allen, 100 Iowa, 7, it is held reversible error for the court to imply by questions asked of a witness that the latter had been instructed not to answer.

[39] State v. Lee, 80 N. Car. 484; Epps v. State, 19 Ga. 118; Sparks v. State, 59 Ala. 82.

., e c . R. Co. v. Morphew, 63 Ill. App. 162; Crane Lumber Co. v. Bellows, 116 Mich. 304; Connor v. Wilkie, 1 Kan. App. 492; State v. Burwell, 52 Kan. 686; City of Frankfort v. Coleman, 19 Ind. App. 368.

[41] Cronkhite v. Dickerson, 51 Mich. 177; Rickabus v. Gott, *Id.* 227; State v. English, 62 Minn. 402, 64 N. W. Rep. 1136.

[42] Williams v. West Bay City, 119 Mich. 395; People v. O'Hare (Mich.), 83 N. W. Rep. 279; People v. Hawley, 111 Cal. 78; Reilly v. C., C. Ry. Co., 90 Ill. App. 364. In Kirby v. State (Tex. Crim. App.), 38 S. W. Rep. 180, the court's remarks were held not to be prejudicial. State v. Stowell, 60 Iowa, 535.

[43] Krapp v. Hauer, 38 Kan. 430; State v. Hayward, 62 Minn. 474, 65 N. W. Rep. 63.

[44] Birmingham, etc. Co. v. Wildman, 119 Ala. 547; Hobbs v. State, 74 Ala. 41; Olds v. Com., 3 A. K. Marsh. (Ky.) 467; Belmore v. Caldwell, 2 Bibb (Ky.), 76; Hunt v. State, 49 Ga. 255; Bennett v. Eddy, 120 Mich. 300, 179 N. W. Rep. 481; People v. Barker, 60 Mich. 277, 27 N. W. Rep. 539. The practice of asking defendant's counsel if he relies on a special plea, while not sufficient cause for reversal, is not commended. State v. Byrd, 52 S. Car. 480.

proached by improper communications; that every safeguard in this respect should be jealously upheld, and that such communications by judges are so dangerous and impolitic that they will be presumed to have influenced the jury improperly.[45] In Sargent v. Roberts,[46] a case often cited on this point, the position is taken that no communication whatever ought to take place between the judge and the jury after the case has been committed to them by the charge, unless in open court, and where practicable in the presence of counsel; that the oath of the officer having the jury in charge indicates that such should be the case, and it is better that everybody should suffer inconvenience than that a practice should be encouraged which is capable of abuse, or at least of being the ground of uneasiness and jealously. This decision is in line with a number called forth by a practice justices of the peace had of conferring with the jurors in their rooms,[47] and has not been followed invariably,[48] but in its general principles, that do not conflict with the right the judge has of giving to the jury additional instructions as to the law, the opinion is in accord with the weight of authority.[49] It has been held error even for the judge to go into the jury room and confer with them about the case though nothing was said to influence them in passing on its merits.[50] The judge has a right to give the jury instructions upon the law after they have retired, even *sua sponte* and although counsel are not present. The new instructions should be in writing and returned by the jury into court with the other papers, thus enabling counsel to save exceptions thereto;[51] but an early case held that it was improper for the court to send word to the jury that if they wished any information on the law they should send to the court.[52] It has been further held in this connection that a party whose evidence was read to the jury on giving them additional instructions has no ground for exception,[53] and that, where it appears that there was communication to which an objection is made, it devolves on the party not objecting to show the nature of the communication.[54]

Forcing an Agreement by Threats or Otherwise.—What is a reasonable time to keep a jury together in case they fail to agree is a matter largely within the discretion of the trial judge, but he should refrain from any expressions savoring of threat or coercion to force an agreement.[55]

Justice Harris, of New York, said: "A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right even to allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. The jury, while all proper motives to induce them to agree upon a common verdict may be repeatedly and earnestly urged upon them, should be left to feel that they act with entire freedom in their deliberations; that should they continue to disagree they are not to be exposed to unreasonable inconvenience nor receive the animadversion of the court."[56]

It has been held to be reversible error for the judge to tell the jury that he would keep them to the end of the term unless they

[45] O'Brien v. Ins. Co., 38 N. Y. Sup. Ct. Rep. 482; Plunkett v. Appleton, 51 How. Pr. 469.

[46] 1 Pick. 337.

[47] Bunn v. Croul, 10 Johns. 239; Taylor v. Betford, 13 Johns. 487; Neil v. Abel, 24 Wend. 185.

[48] Goldsmith v. Solomons, 2 Strobhart (24 S. Car.), 296.

[49] State v. Alexander, 66 Mo. 148, 163; State v. Patterson, 45 Vt. 308; Watertown B. & L. Co. v. Mix, 51 N. Y. 558; Chinn v. Davis, 21 Mo. App. 363; Com. v. Heden, 162 Mass. 521.

[50] State v. Wroth, 15 Wash. 621; Lester v. Hays, 14 Tex. Civ. App. 643; 2 Thompson on Trials, sec. 2555. In Read v. City of Cambridge, 124 Mass. 567, the court says, that it will not inquire under such circumstances whether the communication was in fact erroneous or prejudicial, but the contrary is held in People v. Kelly, 94 N. Y. 526. See also Danes v. Pearson, 6 Ind. App. 465; Fisher v. People, 23 Ill. 218; Benson v. Clark, 1 Cow. 258; Kirk v. State, 14 Ohio, 511; Wiggins v. Downer, 67 How. Pr. Rep. 65. In Priest v. State (Tex. Crim. App.), 34 S. W. Rep. 611, it was held not error for a judge who was desirous of knowing whether it was necessary to send out for a talesman to make out another jury to go into a jury room and ask the jury whether or not they would soon agree, but that the better practice would be to bring the jury into open court.

[51] Sch. Dist. No. 1 v. Bragdon, 25 N. H. 517; Shapley v. White, 6 N. H. 172; Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Allen, etc. Co. v. Aldrich, 29 N. H. 63; State v. Green, 7 La. Ann. 518; Roy v. Goings, 112 Ill. 667.

[52] Hoberg v. State, 3 Minn. 262.

[53] Alexander v. Gardiner, 14 R. I. 15.

[54] Koehler v. Cleary, 23 Minn. 326.

[55] Buntin v. Danville, 93 Va. 200, 211.

[56] Green v. Telfair, 11 How. Pr. 260, quoted in Price v. Carter, 39 Fla. 362.

agreed, as the county could not afford to try the case over again, or for him to use similarly coercive language.[57]

Each juror should be left perfectly free to pronounce his own convictions and the judge should not, even if his patience is tried, infringe upon the functions of the jury by suggestion or otherwise,[58] but if the restraint is not improper or no injustice is done the complaining party, a reversal is not warranted.[59] It is not error to call attention to the fact that an agreement is desirable.[60]

Absence of the Judge and Other Irregularities.—During the absence of the judge from the presence and the hearing of the jury while evidence is being taken or counsel is arguing, the proceedings are regarded as *coram non judice*. There is no court without a judge and his presence is as necessary at one time as another to assert his authority,[61] and it has been held in a criminal case, in which class of cases this point most frequently arises, that it makes no difference that the parties consented and that the judge was in the same building and an attorney was presiding in court.[62] It is not reversible error for the judge to step into an adjoining room where he can hear what is said in court and be ready to pass on objections,[63] and in any event to justify a reversal it must appear that prejudice resulted.[64] In at least one reported case the trial judge it appeared was intoxicated while on the bench. The conduct is characterized not only as reprehensible but also as criminal.[65]

Exceptions by Counsel.—It is the duty of the counsel complaining of what is regarded as misconduct on the part of the trial judge to object thereto and to preserve exceptions to the rulings. If this is not done the objections are considered waived.[66] The mere statement of counsel in a record on appeal that the judge acted improperly on the trial is not sufficient. The error must be made clearly to appear.[67] A party who does not ask that the jury retire, during a discussion, cannot afterwards object on the ground that the remarks were made in the jury's presence.[68] When improper acts are not done in court, of course counsel are not expected to object at the time, but can bring the irregularities to the attention of the court on a motion for a new trial.[69] While the above doctrine requiring the preservation of exceptions is generally adopted there are cases in which verdicts will be set aside without ex-

[57] Slater v. Mead, 53 How. 57; N. D. C. Ry. Co. v. McCue (Tex. Civ. App.), 35 S. W. Rep. 1080; Ins. Co. v. White (Ark.), 24 S. W. Rep. 425; State v. Hill, 91 Mo. 423; McPeak v. Railroad, 128 Mo. 644; Physioc v. Shea, 75 Ga. 466; T. H., etc. R. Co. v. Jackson, 81 Ind. 19; State v. Bybee, 17 Kan. 462; State v. Ladd, 10 La. Ann. 271; Randolph v. Lamkin (Ky.), 14 S. W. Rep. 539; Edens v. Railroad Co., 72 Mo. 212; Phœnix Ins. Co. v. Moog, 81 Ala. 335; Pierce v. Rehfus, 35 Mich. 54; South. Ins. Co. v. White (Ark.), 24 S. W. Rep. 425; Green v. Telfair, 11 How. Pr. 260; T. H., etc. R. Co. v. Jackson, 81 Ind. 19; Obear v. Gray, 68 Ga. 182; Spearman v. Wilson, 44 Ga. 473. Similar error on the part of a sheriff is reversible. Gholston v. Gholston, 31 Ga. 625.

[58] Sargent v. Lawrence, 16 Tex. Civ. App. 540; People v. Engle, 118 Mich. 287 (distinguishing Com. v. Tuey, 8 Cush. 1); McPeak v. Mo. Pac. Ry. Co., 128 Mo. 644; State v. Hill, 91 Mo. 423; State v. Punshon, 124 Mo. 458; Ins. Co. v. White (Ark.), 24 S. W. Rep. 425; Goodsell v. Seeley, 46 Mich. 623; Randolph v. Lampkin (Ky.), 14 S. W. Rep. 8.

[59] Shely v. Shely (Ky.), 47 S. W. Rep. 1071; Farnham v. Farnham, 73 Ill. 497; State v. Garrett, 57 Kan. 132; Wiggins v. Downer, 67 How. Pr. 65; Erwin v. Hamilton, 50 How. Pr. 32 (distinguishing Green v. Telfair, 11 How. Pr. 260); State v. Rogers, 56 Kan. 362; (distinguishing State v. Bybee, 17 Kan. 462); Buntin v. Danville, 93 Va. 200; Pierce v. Rehfus, 35 Mich. 53.

[60] Allen v. Woodson, 50 Ga. 53.

[61] Palin v. State, 38 Neb. 862; Thompson v. People, 144 Ill. 378; Hayes v. State, 58 Ga. 35; State v. Benerman, 59 Kan. 586, 53 Pac. Rep. 874; O'Brien v. People 17 Colo. 561; 1 Bishop Cr. Pro. sec. 957; State v. Smith, 49 Conn. 376; Davis v. Wilson, 65 Ill. 525; Britton v. Fox, 39 Ind. 369; State v. Carnagy, 106 Iowa, 483; Palin v. State, 38 Neb. 862.

[62] Merideth v. People, 84 Ill. 479. On a point that a member of the bar cannot exercise judicial powers see Hoagland v. Creed, 81 Ill. 506; Bishop v. Nelson, 83 Ill. 601; and Cobb v. People, 84 Ill. 511.

[63] Shintz v. People, 178 Ill. 320; Turbeville v. State, 56 Miss. 793; State v. Smith, 49 Conn. 376.

[64] Allen v. A. & C. Ry. Co., 106 Iowa, 602. The appellate court of Illinois has recently decided in C. C. Ry. Co. v. Anderson, 93 Ill. App. 419, that while a nap of four or five minutes during a trial of eight or nine days' length is an irregularity on the part of the judge, it is not necessarily reversible error, when counsel does not suspend the examination of the witness on the stand or attempt to awaken the judge and no exception is taken to the latter's conduct. This case has just been affirmed by the supreme court, 193 Ill. 9.

[65] Redpath v. Walker, 13 Colo. 109.

[66] Mahoney v. Decker, 18 Hun, 365; C., etc. Co. v. Havelick, 131 Ill. 179; Fein v. Cov M. B. Assn., 60 Ill. App. 275; Throckmorton v. Eve, Post Pub. Co., 54 N. Y. Supp. 887; Com. v. Preston, 188 Pa. 429; Owen v. Long, 97 Wis. 78; Cone v. Smyth, 3 Kan. App. 607.

[67] Reiger v. Davis, 67 N. Car. 185; Mittel v. City of Chicago, 9 Ill. App. 543; Kellar v. State, 102 Ga. 506.

[68] Gregory v. State (Tex. Crim. App.), 43 S. W. Rep. 1017, rehearing denied 48 S. W. Rep. 577.

[69] Danes v. Pearson, 6 Ind. App. 465.

ceptions. Justice Ward, of New York, on this subject, said: "A verdict improperly influenced by a misdirection of the judge or by prejudicial statements will be set aside upon motion upon a case made, although no exception has been taken at the time of the trial."[70]

Conclusion.—Decisions bearing on the different phases of the general subject under discussion are too numerous to permit their exhaustive citation with convenience and profit. The foregoing considerations are based, so far as practicable, on the more recent decisions. One conclusion is, that reversals on account of errors on the part of trial judges continue to be frequent. A change in this respect can be effected in one of two ways: improvement in conduct and speech on the part of judges or modifications in the jury system as fixed by constitutional and statutory provisions and judicial interpretations thereof. While it may be insisted by some that the system could be improved, there is apparent no general desire for modifications sufficiently radical to dispense with free and unbiased verdicts, and so long as unprejudiced judgments by the jury on the facts are desired, so long will trial judges be limited in the exercise of their powers in order that the province of the jury may not be invaded. A system of trials by jury, as free from extraneous and improper influences as possible, is apparently as highly cherished by the people now as it ever has been.

The position of a judge presiding at a jury trial is a difficult one, requiring wise discretion and good judgment. Portia, although entertaining a prejudice seldom exceeded was praised during a brief judicial career for being an upright and learned judge. There are many more excellent qualities besides uprightness and learning that the competent trial judge should possess. He should be vigilant in the detection of trickery and fraud and yet patient when dealing with the timid and inexperienced. He should be determined, for the enforcement of law requires strength, and yet he should be open to conviction in order that his opinions may not lead him to oppose the right. He should be industrious, impartial, considerate and, in brief, pre-eminently capable. Matters before him are frequently of great importance and the questions involved bitterly contested. The lawyers are partial to their respective sides, if not unreasonably prejudiced. They are sometimes shrewd and in too many instances dishonest. Witnesses are in many cases careless, forgetful and ignorant. All these and many other considerations add to the difficulties of the trial judge. Under these circumstances there should be no blame attached to an honest, competent judge, who, inadvertently or by mistake, commits a reversible error, His elevation to the bench did not lift him above fallibility.

The printed law reports, however, show conclusively that trial judges do commit errors for which there can be no valid excuses. Remarks are made or acts done by judges who must have been prompted at the time by levity, impatience, anger, partiality or absolute indifference to the cause of justice.

To avoid the prejudicial effect of errors of this kind statutes and judicial decisions restrict trial judges to such conduct and remarks as are required by a proper regard for the rights of litigants and the province of the jury.

Chicago. CYRUS J. WOOD.

[70] Davison v. Herring, 48 N. Y. Supp. 760; Whittaker v. Canal Co., 49 Hun, 400, 3 N. Y. Supp. 576; Roberts v. Tobias, 120 N. Y. 6, 23 N. E. Rep. 1105; Mandeville v. Martin, 30 Hun, 282; Hogan v. Railroad Co., 124 N. Y. 649, 26 N. E. Rep. 960.

FIRE INSURANCE—REMOVAL OF STOCK—CONSENT OF AGENT.

POLLOCK v. GERMAN FIRE INSURANCE COMPANY OF PITTSBURG, PA.

Supreme Court of Michigan, July 10, 1901.

1. Comp. Laws, sec. 7246, relative to foreign insurance companies, declares that the term "agent" shall include any acknowledged person who shall aid in transacting the business of any foreign insurance company. Held, that where an insurance agent procured another to write a policy in one of his foreign companies on property of the former agent's customer, and thereafter delivered the policy, collected the premiums, and attended to all dealings relative to the policy with the insured, he was the agent of the company, so that his consent to a removal of the stock to other premises was binding on the insurer.

2. Where a policy provides that no conditions thereof shall be waived or altered unless consent thereto is indorsed on the policy, but the company's agent consents to a removal of the insured stock to other premises, and continues to accept premiums, the insurer cannot defend against an action on the policy on the ground that the consent was not binding, not having been indorsed by the policy.

MOORE, J.: This is an action upon a fire in-

surance policy. The policy was dated September 4, 1894, and was for one year. It contained the following provisions: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to wave any provision or condition of this policy except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist, or be claimed by the insured, unless so written or attached." It is conceded that, if defendant is liable at all, it is for $1,800 and interest from July 19, 1899. The facts are not in dispute. The plaintiffs are wholesale merchants in Detroit. For some years their place of business was at 143 Jefferson avenue. In September, 1898, plaintiffs ordered from Bierce & Sage $4,000 of insurance, and they delivered two policies of $2,000 each, running one year from above date. One of these policies was in the defendant company. Bierce & Sage were not agents for this company, but it was represented in Detroit by one Victor P. Gaukler, from whom Bierce & Sage ordered the insurance. Gaukler delivered the policy to Bierce & Sage, and the latter delivered it to plaintiffs. Later Bierce & Sage collected the premium from plaintiffs, and made a settlement with Gaukler. Plaintiffs began moving from 143 to 185 Jefferson avenue about January 1, 1899. Before commencing to move, Robert Pollock had called the attention of Frank Sage, an employee, and special agent for Bierce & Sage, to the contemplated change, and shown him the new location. Sage told him he was glad they were going to move, that it was a better risk, and that their insurance must be transferred. The record shows the fire risk in the new location was regarded as less than in the old one. January 3d, Robert Pollock telephoned Bierce & Sage to transfer their insurance from 143 to 185. Mr. Sage then called up Gaukler's office, and told the young lady who answered the telephone that Pollock, Pettibone & Chapman were moving, or had removed, to 185 Jefferson avenue, and wanted their insurance transferred. All of these policies were transferred as of January 3d, except two, which were transferred on the 9th. Plaintiffs supposed all their insurance had been transferred to the new location. The fire occurred April 4, 1899. After the fire, it was discovered that the policy in defendant company had not been formerly transfered to the new location by transfer slips actually affixed to the policies. It is insisted Bierce & Sage were not defendant's agents, and that no permission was given in writing to remove the goods to the new location.

The first question calling for attention is, under the facts and circumstances shown, were Bierce & Sage agents of the defendant? The legislature of this state has undertaken to regulate the manner in which, and the conditions under which, foreign insurance companies can do business in this state. Section 7246, Comp. Laws, makes it obligatory upon the company to do certain things before it can do business at all in the state. The section also contains a provision reading as follows: "The term agent or agents under this section, shall include any acknowledged agent, surveyor, broker or other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this state." Wisconsin has a statute in substance like this one, which has been construed by the courts of that state a number of times. In Schomer v. Insurance Co., 50 Wis. 575, 7 N. W., Rep. 544, the facts are almost, if not quite, the same as those in this case, Lawson standing in the place of Bierce & Sage. In disposing of the case the court said: "Now, it is difficult to imagine what object this provision was intended to accomplish, or what purpose subserve, if it has not the effect, under the circumstance, to make Lawson the agent of the defendant in the transaction. His acts certainly bring him within both the letter and the spirit of the law. He was the only real actor for the defendant in making the contract. *Pro hac vice* he assumed to represent, and did represent the company in the matter. He received the application, settled with the insured the note and terms of insurance, delivered to them the policy, collected the premium, and shared in the commission. In fact, he did everything that was done on behalf of the company, except the mere act of countersigning the policy. He was the only person the plaintiffs dealt with. They knew no other agent in effecting the insurance. They were totally ignorant of his relation to the defendant, or of his want of authority to represent and act for it. It is idle to deny that he did not in any manner aid or assist in making the contract fo the company when he was, in fact, the only person who did treat with the plaintiffs on its behalf. * * * But it is said that is was unreasonable to make the defendant responsible for the acts of Lawson, who was never authorized to act for it, or bind it in any way. The answer to this objection is, the legislature has assumed the right to regulate the business of insurance, and prescribe the manner it shall be conducted in this state. It has declared that whoever solicits insurance on behalf of an insurance company, or makes any contract of insurance, or in any manner aids or assists in making such contract, or transacts any business for the company, shall be held an agent of such company to all intents and purposes The obvious intention of the legislature is to

make an insurance company responsible for the acts of the person who assumes really to represent and act for it in these particulars, and to change the rule of law that the assured must, at his peril, know whether the person with whom he is dealing has the power he assumes to exercise, or is acting within the scope of his authority. * * * It seems to be designed in the clearest manner to make the company responsible to the public for the acts of one whom it permits to solicit insurance on its behalf, or who receives applications for insurance, makes or aids in making contracts of insurance, or transacts the business, whether such person has in fact authority to act for it or not. The law imposes upon the company the duty of seeing to it that none but its regular authorized agents shall do its business, or deal with the public. It is certainly not difficult for an insurance company to say to the local agents that they alone must transact the bus ness; that they must in all cases deal directly with the insured in making insurance contracts, and not allow the interference of any stranger in its business, for whose acts it does not wish to be held responsible. That this is the plain object and intent of the statute we have no doubt. And, where the insurance company issues a policy in a case where a person has assumed the right to act for and represent it in making the contract, it must abide by the consequences, and meet the liability which the statute imposes upon it." A like statute applying to a like case was construed in Insurance Co. v. Ruckman (Ill. Sup.), 20 N. E. Rep. 77, where the court said: "The manifest intention was to make such companies responsible for the acts, not only of its acknowledged agents, etc., but also of all other persons who in any manner aid in the transaction of their insurance business. Nor do we see anything inequitable or oppressive in such provision. Doubtless, the mere assumption of authority to act for an insurance company will not of itself charge the company with responsibility for the acts of the assumed agent. The company must in some way avail itself of such acts, so that the person performing them may be said to aid the company in its insurance business. But, after the company has availed itself of the acts of the assumed agent, and thus adopted them as its own, there is nothing oppressive in assuming as against such company the existence of the relation of principal and agent, and charging the company with responsibility for such acts." See, also, Alkan v. Insurance Co., 53 Wis. 136, 10 N. W. Rep. 91; [illegible] Co., 63 Wis. 157, 23 N. W. Rep. 132; Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. Rep. 948; May v. Assurance Co. (C. C.), 27 Fed. Rep. 260; McGraw v. Insurance Co., 53 Mich. 145; Ahlberg v. Insurance Co., 94 Mich. 259, 53 N. W. Rep. 1102. We see no reason why the same construction should not be put upon this statute that has been put upon like statutes in sister states.

We then come to the question, does the liability of the company cease because the goods were removed to a new location without the consent to the removal being indorsed upon the policy? In Ins. Co. v. Gusdorf, 43 Md. 506, the policy provided that "anything less than a distinct agreement indorsed on this policy shall not be construed as a waiver of any written or printed condition, restriction or stipulation herein contained." The goods were damaged by fire during the life of the policy, but not until they had been removed to an adjoining building. Previous to the removal, the insured went to the company's office, and there saw the president, and notified him that he desired to move into another brick building, and asked whether there was any objection to his so doing. The president asked him if he had his policy with him, and, on being informed that he had not, replied it did not matter; he could fix it all right. Insured understood him to say it was not necessary for him to bring the policy. The company defended on the ground that there was no indorsement on the policy consenting to the removal of the goods. Miller, J., after referring to the case of Insurance Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289, which was a case of additional insurance without the stipulated indorsement on the policy, said: "Since that decision, the doctrine of equitable estoppel has, especially in insurance cases, been extended, and applied at law as well as in equity, by adjudications of the courts of last resort in many of the states, and the current and weight of judicial precedent and authority in this country have established the proposition that in such cases the estoppel is equally available in either tribunal. The supreme court in Wilkinson's case, 13 Wall. 222, 20 L. Ed. 617, has also in a very able opinion sustained this position. * * * The principle is that, where one party has, by his representations or his conduct, induced the other party to a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage. This proposition, thus sustained by the modern decisions, and founded in reason and justice, they add, does not admit that the written instrument may be contradicted by oral testimony, but goes upon the idea that it may be shown by such testimony that the written instrument cannot be lawfully used against the party whose name is signed to it. Most of the reported cases in which this doctrine has been applied, are those where the acts, representations, or omissions of the agents of the companies precede or attend the issuing of the policies. But it is also applicable where facts arise during the currency of the contracts; as, for instance, where, in cases of insurance by a mutual insurance company, assessments have been made and received by the company on the premium note, or where premiums have been received after knowledge, actual or constructive,

of the invalidity of the policy *ab initio*, or of a subsequent breach of its conditions. May, Ins. § 502. In our opinion, the case before us falls clearly within the principle thus established, and it is no extension of the doctrine thus to apply it. The assured, before removing his goods, applied in person to the president of the company, and asked him if there was any objection—that is, would the removal affect the continuance of the insurance upon them? He was informed by the president, who knew of the absence of the policy at the time, that it was no matter, that he would fix it all right, and that he need not bring the policy. That is, he said to the assured, in effect: 'Go on, and remove your goods. You need not bring your policy, and have the permission to do so indorsed on it. The insurance shall continue in force without such indorsement.' The assured departs, and removes his goods, relying upon the statements and assurance thus made and given to him. By so acting he did that which prejudiced his interest under the policy. He thereby gave the company the advantage of retaining the premium without further continuance of the risk, and also the advantage of setting up this defense against their liability after the loss had occurred. Would not the success of this defense operate a fraud upon the assured? We think it clear the company ought to be and are estopped from making it. Whilst the law affords ample protection to these companies, as well as to individuals, against frauds, misrepresentations, and breaches of warranty, it will not, and ought not, to help them to perpetrate frauds upon those with whom they make contracts, in which good faith on both sides, as well in their continuance as origin, has always been regarded as a ruling consideration." In Henschel v. Insurance Co., 4 Wash. 476, 30 Pac. Rep. 735, 31 Pac. Rep. 332, 765, the insured, desiring to remove his goods several blocks distant from the place where they were originally insured, delivered his policy to the company's agent, who promised to indorse consent to the removal on the policy, in writing, and return it to him. Before the indorsement was made, the building to which the goods had been in the meantime removed was burned, and a loss occurred. The agent then indorsed a cancellation on the policy. The company disclaimed liability, and in an action insured recovered the full amount of the insurance. The policy contained a clause like the one in the policy in this case as to limitations upon the power of agents and the necessity for written indorsements. Stiles, J., said: "The appellant substantially claims for a clause the construction that, until its consent was physically indorsed upon the paper, the property of the respondent was unprotected in its new location, notwithstanding the agreement of the agent to indorse the necessary consent, and his receipt and retention of the policy for that purpose. The respondent claims that the conduct of the agent estops the appellant to say that the proper indorsement was not made. Appellant's counsel have presented us many eminent authorities upon the subject of the waiver of conditions in such contracts by agents, but with due respect to the learning of counsel, and the force of the authorities they produce, we cannot regard this as a case of technical waiver. We do not find that the respondent is proposing to strike from the policy a single line or word, but that, fully recognizing the binding force of the extremest stipulations against him, he went to the agent, and himself proposed a strict compliance with them. To this proposition the agent assented, and agreed, not that anything should be waived, but that he himself would indorse upon the contract the words necessary to cover the goods in their new location; and now the respondent, invoking the equitable rule that, since he has relied upon the promise made to him, what was agreed to be done shall be taken as having been done, claims that the contract is what it, but for the negligence of the agent, undoubtedly would have been." The court then proceeds to discuss the power of the agent, and quotes with approval, Insurance Co. v. Gusdorf, 43 Md. 506, and closes with these words: "So, in this case, the appellant, having received the premium for a year's insurance, now, without any offer to return any portion of the unearned premium, gets up what we deem an unconscionable defense, when it claims that, after actually insuring the respondent less than thirty days, the neglect of its own agent to do what he ought to have done should relieve it of all liability." In Pelkington v. Insurance Co., 55 Mo. 172, where it was made the express condition of a contract of insurance that, if the assured should make any other insurance on the property without the written consent of the company indorsed on the policy, he should recover no insurance thereon, and it appearing that the agent was duly notified of such additional insurance, and made no objection, the court said: "When the assured has notified a company that he has procured additional insurance, it is the duty of the company, if it does not intend to be further bound, or to continue the risk, to express its dissent, and not allow the party to repose in fancied security, to be victimized in case of loss. It is unconscientious to retain the premium, and affirm the validity of the contract, while no risk is imminent, but, the very moment that a loss occurs, then to repudiate all liability, and claim a forfeiture. If the indorsement is not made upon notice duly given, a waiver will be presumed, in the absence of any dissent. If a party, by his silence, directly leads another to act to his injury, he will not be permitted, after the injury has happened, to then allege anything to the contrary, for he who will not speak when he should will not be allowed to speak when he would." See Copeland v. Insurance Co., 77 Mich. 560, 43 N. W. Rep. 991, 18 Am. St. Rep. 414; Tubbs v. Insurance Co., 84

Mich. 652, 48 N. W. Rep. 296. In this case Bierce & Sage notified the persons in charge of Mr. Gaukler's office of the removal of these goods. This would be notice to the agent, and hence notice to the company. In Steele v. Insurance Co., 93 Mich. 84, 85, 53 N. W. Rep. 514, Grant, J., said: "The precise claim is that local agents cannot delegate their authority to clerks, unless such authority to redelegate is conveyed in express terms. In general this is true, but courts will recognize the ordinary course of business. It must be well known that these local agents do their business to a very large extent through clerks, who solicit insurance, make out applications and policies, and generally attend to the business of their employers. In such cases their acts are as binding as hough done by the agents themselves"—citing Story, Ag. § 14; Insurance Co. v. Ruckman, 127 Ill. 364, 20 N. E. Rep. 77; Bodine v. Insurance Co., 51 N. Y. 117, 10 Am. Rep. 566; Bennett v. nsurance Co., 70 Iowa, 600, 31 N. W. Rep. 948. See nsurance Co. v. Fahrenkrug, 68 Ill. 463.

There could be no possible question about the authority of Gaukler to consent to the removal of these goods, and, he and the company having knowledge of their removal, it became the duty of the company to do one of two things—either consent to the removal, or cancel the policy, and return the unearned premium. It could not retain the premium, and thus profit by it in case there was no loss, and, the moment there was a loss, deny any liability, though still retaining the premium. McGraw v. Insurance Co., 54 Mich., 148, 19 N. W. Rep. 927; Haire v. Insurance Co., 93 Mich. 481, 53 N. W. Rep. 623, 32 Am. St. Rep. 516; Insurance Co. v. Maguire, 51 Ill. 342; Golt v. Insurance Co., 25 Barb. 189; Hathorn v. Insurance Co., 55 Barb. 28; Lippman v. Insurance Co. (N. Y. App.), 24 N. E. Rep. 699, 8 L. R. A. 720. We think, under the facts shown by this record, defendant company is liable. The judgment is reversed, and judgment may be entered in this court for $1,800, from July 19, 1899, at 5 per cent.

NOTE.—*Effect of Statutory Provisions on the Employment of Agents by Insurance Companies.*—Of late years a number of the states of the American Union have passed statutes regulating the employment of agents by foreign insurance companies and declaring what persons shall be considered agents of insurance companies. The general intent of these statutes is to make insurance companies responsible for the acts, not only of its acknowledged agents, but also of all other persons in any manner aiding in the transaction of their business and the fruits of whose labor they accept. These statutes are all of late origin, but have in all cases been approved by the courts. An examination of the recent authorities in which these statutes have been construed would not be unprofitable. Thus, the laws of Iowa, 1880, ch. 211, section 1, provides that any person who shall thereafter solicit insurance, or procure application therefor, shall be held to be the soliciting agent of the insurance company, or association issuing a policy on such application or on a renewal thereof, anything in the application or policy to the contrary notwithstanding. It was held under this statute that a foreign insurance company undertaking to do business in Iowa is subject to the provisions of the above statute. Mutual Benefit Life Insurance Co. v. Robison, 54 Fed. Rep. 580. Revised Statutes of Wisconsin, 1878, sec. 1977, provides that whoever solicits insurance on behalf of "any insurance corporation" or transmits any application, etc., shall be held to be the agent of "such corporation." In the comparatively recent case of Dell v. Insurance Co., 75 Wis. 521, 44 N. W. Rep. 828, it was held that an incorporated mutual insurance company was within the statute. It was also held by the Iowa Supreme Court, construing this same provision of the Wisconsin statutes, that one who, accepting an application for insurance on property in Wisconsin, procured, through a general agent residing out of the state, a policy for defendant insurance company, and received a commission, is an agent of defendant within the statute. Fred Miller Brewing Co. v. Insurance Co., 95 Iowa, 31, 66 N. W. Rep. 65. A case recently arose in Texas on the following statement of facts: E, who had been furnished by a foreign insurance company with blank applications for insurance, supplied some to A., who solicited insurance from plaintiff, took his application and forwarded it to E. The company sent a policy to A. through E., and A. delivered it to plaintiff and collected and paid over the premium. The court held that A. was the company's agent within the meaning of Sayles' Annotated Statutes, article 2943a, declaring, that any person who solicits insurance on behalf of any insurance company, or performs any other act in consummating any contract of insurance, shall be held as the agent of the company. Southern Insurance Co. v. Hardware Co. (Tex. 1892), 19 S. W. Rep. 615. The Alabama Code defines an agent for the insurer as anyone who solicits insurance, or transmits an application or policy, or gives notice that he will transmit or receive them, or receives or delivers a policy, or inspects a risk, or makes or forwards a diagram, or does anything in the making of an insurance contract for another. In a case which arose in that state recently, defendants solicited from plaintiff an order to place a risk and asked a Chicago broker to place it. The broker had the policy sent to the plaintiff, who sent his check for the premium to defendants, and they remitted proceeds to the broker. The court held that defendants were the insurer's agents, though they had no correspondence with it and did not know that such company existed or had issued plaintiff a policy. Noble v. Mitchell, 100 Ala. 519, 14 South. Rep. 581.

From an examination of the cases it seems that it is customary among insurance agents to write what is known as "exchange insurance;" that when an agent receives an order for insurance, which, for some reason, he cannot write in his own companies, he places it with other agents. In such cases, the customer does business solely with the agent with whom he places the order, and does not know or come in contact with the agent who actually writes the policy at all. It is held that if an insurance company accepts a policy procured in that manner, they at the same time accept the one procuring such insurance, as their agent, and are bound by his acts. Schoener v. Heckla Fire Insurance Company, 50 Wis. 575. In this case, a Mr. X, in pursuance of a custom among the insurance agents in a city, procured a certain risk, for which application had been made

to him, to be taken by two companies of which Y, another agent, was the authorized agent. X delivered the policies, countersignod by Y, and collected and paid to Y the premiums, which were divided between X and Y. The assured did not know of anything that occurred between X and Y, or that X was not authorized to act as agent of said two companies. X knew when the application was made that the applicant intended to procure further insurance elsewhere; and after he delivered the two policies, he assented to such further insurance, contrary to a condition in those policies, and without the knowledge of the companies or of Y. The court held that X must be regarded as an agent "to all intents and purposes," o f the two companies whose policies he delivered, within its statute, and that they were bound by his waiver of the condition against further assurance. Illinois is extremely liberal toward the assured in the construction of the relation of agency under its statute. In that state the statute provided that the term "agent" shall include an acknowledged agent, surveyor, broker, or any other agent who shall in any manner aid in transacting the insurance business of any foreign company. It was held by the Court of Appeal that one employed by insurance agents of a foreign company to assist them in their insurance business, who did the general office work, kept books, conducted correspondence, collected premiums, and acted as solicitor, to the knowledge of the company, was its agent, under the above statute, and that his agreement to insert a certain provision in a policy will be binding upon it. Continental Insurance Co. v. Ruckman, 29 Ill. App. 404. This case was afterwards affirmed by the supreme court in 127 Ill. 364, 20 N. E. Rep. 77, 11 Am. St. Rep. 121.

In regard to the second question in the principal case—the right of an agent to waive any of the conditions of the policy either orally or in writing—the opinion undoubtedly states the correct rule. The cases are multitudinous on this subject and it would serve no useful purpose at this time to review them at length. The courts are nearly all uniform that the company or its agent may waive the conditions of a policy either orally or in writing, whatever may be the requirement of the policy on that point. On one provision, however, the authorities are somewhat conflicting, *i. e.*, that relating to a prohibition against additional insurance, some courts, on grounds of public policy, holding that such condition cannot be waived except in the manner provided in the policy. But this phase of the question is not involved in the principal case. On the point that is involved therein, however, *i. e.*, the right of an agent to waive a condition that consent to the removal of the property insured must be in writing, the great weight of authority is on the side of the court in the principal case that an agent of the insurer may waive such requirement and consent orally to the removal. In Massachusetts, however, the courts refuse to recognize the rule as stated. Parker v. Insurance Co., 162 Mass. 479, and authorities cited. In this case it was held that an agent of an insurance company, to whom the company had intrusted blank policies, with authority to issue them, "and by writing indorsed thereon, to renew any of such policies, or to vary the risk therein," and providing that all of his powers are to be exercised subject to the rules and regulations of the company, has no authority to give an oral assent to a removal of property insured by a policy containing a condition requiring the written or printed assent of the company to such removal.

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. LXXXI. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1901. Sheep. Price, $4.00. Review will follow.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

ABATEMENT AND REVIVAL—What Causes Survive.—Where husband appeals after decree of alimony, and both parties die, the cause survives in favor of the personal representative.—Coffman v. Finney, Ohio, 61 N. E. Rep. 155.

ACCIDENT INSURANCE—Intoxication as Affecting Accident Policy.—One may become so intoxicated as to be incapable of having an intention, so as to authorize a party injured by such person while in such intoxicated condition to recover on an accident policy declaring against a recovery thereon where the injuries were inflicted intentionally.—Northwestern Benev. Soc. v. Dudley, Ind., 61 N. E. Rep. 207.

ACTION—Misjoinder—A count for damages for conspiracy, injuring plaintiff, and a second count on behalf of plaintiff and others likewise injured, seeking to restrain the continuance of such conspiracy, held to be a misjoinder of causes of action.—Hawarden v. Youghiogheny & L. Coal Co., Wis., 87 N. W. Rep. 472.

ADMIRALTY—Nominal Damages.—Nominal damages for personal torts are not awarded by courts of admiralty.—*In re* California Nav. & Imp. Co., U. S. D. C., N. D. Cal., 110 Fed. Rep. 670.

ADVERSE POSSESSION—Land Only Partly Possessed.—Where the evidence in an ejectment suit showed adverse possession of part only of a strip of land, to direct a verdict for defendant for the whole strip was error.—Kreckberg v. Leslie, Wis., 87 N. W. Rep. 450.

ALTERATION OF INSTRUMENTS—Application for Insurance Policy.—Alteration of copy of application returned with policy held not to invalidate policy.—Steeley's Creditors v. Steeley, Ky., 64 S. W. Rep. 642.

APPEAL AND ERROR—Double Appeal.—An appeal from a judgment, and from an order thereafter entered, denying a new trial, will not be dismissed as being a double appeal.—Kountz v. Kountz, S. Dak., 87 N. W. Rep. 523.

APPEAL AND ERROR—Judgment on Demurrer.—Record entry, copied from bench notes of trial judge showing court's action on demurrers, held not such a judgment on the demurrers as will authorize a review on appeal.—Tinney v. Central of Georgia Ry. Co., Ala., 30 South. Rep. 628.

APPEARANCE — Agreement to Extend Time.—Agreement between parties extending defendant's time to plead beyond the term at which action on their part was due held sufficient appearance to sustain subsequent judgment by default.—Cook v. American Exch. Bank, N. Car., 39 S. E. Rep. 746.

ASSIGNMENTS — Right of Assignment. — Where plaintiff is entitled to have a chose in action assigned to him, but it is assigned to defendant, plaintiff is not entitled to the claim unless he gave notice of his right to the debtor before defendant did so, and defendant knew of plaintiff's claim.—Enochs-Havis Lumber Co. v. Newcomb, Miss., 30 South. Rep. 608.

ATTORNEY AND CLIENT — Liability for Mistake of Judgment. — Attorney using ordinary care to learn facts held not liable to client for mistake of judgment as to the law thereon.—Humboldt Bldg. Assn. Co. v. Ducker's Ex., Ky., 64 S. W. Rep. 671.

BANKRUPTCY — Exemptions in a Partnership.— Under the exemption law of New Jersey a bankrupt is not entitled to claim his exemptions out of the assets of a partnership.—*In re* Demarest, U. S. D. C., D. N. J., 110 ed. Rep. 638.

BANKRUPTCY — Set Off. —A bank which is a creditor of a bankrupt, who also had a sum on deposit to his credit at the date of bankruptcy, is entitled to apply the same on its claim as a set-off under Bankr. Act 1898, § 68.—*In re* Little, U. S. D. C., N. D. Iowa, 110 Fed. Rep. 621.

BENEFIT SOCIETIES—Police Relief Associations. — To entitle beneficiary of member of police relief association to recover, the member on whom life certificate was issued must be at the time of his death, a member of the police force and not a pensioner.—Price v. St. Louis Police Relief Assn., Mo. App. (St. Louis No. 8341) decided Nov. 5, 1901.

BILLS AND NOTES — Judgment Against Indorsers.— Payee of a note held entitled to judgment against indorsers for the full amount, notwithstanding he has a chattel mortgage security which is in suit.—Tower Bros. Co. v. Hanson, U. S. C. C., W. D. Mo., 110 Fed. Rep. 611.

BOUNDARIES — Boundary Proceedings Interlocutory.—Order in boundary proceedings held interlocutory, from which, under Code, § 4237, appeal will not lie.—Oster v. Devereaux, Iowa, 87 N. W. Rep. 512.

BROKERS — One Buying for Himself.— A person who buys claims for himself is not a broker.—Gast v. Buckley, Ky., 64 S. W. Rep. 232.

BUILDING AND LOAN ASSOCIATIONS — Value of Shares.—A building association held bound, on a holder's compliance with his contract, to pay him the fixed value of his shares, and not their value based on the company's financial condition.—Hammerquist v. Pioneer Savings & Loan Co., S. Dak., 87 N. W. Rep. 524.

CARRIERS—Conflict of Laws Where Accident Occurred in Another State.—An action against a railroad company to recover damages for an injury received by plaintiff while a passenger in another state is governed by the law of that state as to the degree of care required.—Louisville & N. R. Co. v. Harmon, Ky., 64 S. W. Rep. 640.

CARRIERS— Remittitur for Medical Services.—A verdict for plaintiff in an action against a carrier for personal injuries will be allowed to stand on *remittitur* of amount claimed for medical services, but not proved to be reasonable.—International & G. N. R. Co. v. Sampson, Tex., 64 S. W. Rep. 692.

CARRIERS OF PASSENGERS—Knowledge of Passenger.—Knowledge of passenger purchasing excursion ticket of its conditions conclusively presumed.—Daniels v. Florida Cent. & P. R. Co., S. Car., 39 S. E. Rep. 742.

CHAMPERTY AND MAINTENANCE—Notice of Hostile Claim.—Possession of land by one person which will render void a sale and a conveyance of the same land to another is such actual adverse occupancy contemporaneous with the deed sought to be avoided by it as to give notice in advance to the purchasers of the occupier's hostile claim.—Mayes v. Kenton, Ky., 64 S. W. Rep. 726.

CHARITIES — Liability of Directors of Charitable Corporation.—Action in equity to enforce personal liability of directors of a charitable corporation, absolute and unlimited in character held not maintainable.—Marsh v. Kaye, N. Y., 61 N. E. Rep. 177.

COLLISION — Equal Fault.—Tug and Steamer held equally at fault for collision at night; the steamer for anchoring outside the limits of the anchoring grounds, and the tug for not keeping a proper lookout.—The James D. Leary, U. S. D. C., S. D. N. Y., 110 Fed. Rep. 689.

CONSTITUTIONAL LAW — Taking Notes in Purchase of Patent Rights.—Acts 1897, ch. 77, punishing the taking of notes in purchase of patent rights which do not state the purchase for which given, held valid class legislation, and not violative of Const. art. 11, § 8.—State v. Cook, Tenn., 64 S. W. Rep. 720.

CONTEMPT — Special Judge. — Under Burns' Rev. St. 1894, §§ 1161, 1374, 1019, violation of injunction held not to be contempt of special judge awarding final decree, so as to enable him to punish it.—Kissel v. Lewis, Ind., 61 N. E. Rep. 209.

CONTRACTS — Agreement to make a Will. — Where parties have construed in writing to convey by will as not a contract, and thereafter entered into verbal agreement, the court will give effect to the construction of the parties.—Kling v. Bordner, Ohio, 61 N. E. Rep. 148.

CONTRACTS — Right to Avoidable Damages after Breach.—A party to a contract must avoid avoidable damages. But if plaintiff is compelled by a breach of to purchase more ice at higher prices than it would otherwise have done, it sustained actionable injury.—Creve Cour Lake Ice Co. v. Tamm, Mo. App. St. Louis, decided Nov. 5, 1901.

CORPORATIONS — Holding Stock in Another Corporation.—Under Code, § 1256, subd. 8, a land corporation held not authorized to subscribe for stock in a prospective corporation. — McAlester Mfg. Co. v. Florence Cotton & Iron Co., Ala., 30 South. Rep. 632.

CORPORATIONS — Liability of Directors. — Directors of corporation held liable to account in equity to the corporation for neglect of duties resulting in waste of assets.—Bosworth v. Allen, N. Y., 61 N. E. Rep. 163.

COSTS — Tender of Amount of Claim Before Suit. — Where usury was the sole question in the case, and the suit was commenced after defendant had tendered payment of the full amount for which he was liable the plaintiff is chargeable with the costs of the litigation.—Burkitt v. McDonald, Tex. Civ. App., Tenn., 64 S. W. Rep. 694.

COUNTERCLAIM — Matters of Defense. — Under Rev. St. 1898, §§ 2656, 3078, a counterclaim held demurrable as setting up matters of legal defense.—Appleton Mfg. Co. v. Fox River Paper Co., Wis., 87 N. W. Rep. 453.

COUNTIES — Disallowed Excess o Claim. — Under Laws 1873, ch. 833, as amended by Laws 1874, ch. 535, physician whose claim for services rendered county had been audited held not entitled to sue for disallowed excess.—Foy v. Westchester County, N. Y., 61 N. E. Rep. 172.

COURTS — Presumption of Jurisdiction. — No presumption arises in favor of decree of court of limited jurisdiction.—Chambiee v. Cole, Ala., 30 South. Rep. 630.

CRIMINAL EVIDENCE — Res Gestæ. — Testimony by a companion of deceased as to a remark made by the latter just as he started towards accused held admissible as *res gestæ*.—State v. Bone, Iowa, 87 N. W. Rep. 507.

CRIMINAL EVIDENCE — Striking out Illegal Testimony.—The admission of the coroner's verdict held not reversible error when the court afterwards strikes out such testimony and directs the jury to disregard it.—Colquit v. State, Tenn., 64 S. W. Rep. 713.

CRIMINAL LAW — Autre oi Convict — Where each sale of an article which has been prohibited is a distinct offense, the plea of former convictions is rightly denied.—State v. Broedir, Mo. App., St. Louis No. 8310, decided Nov. 5, 1901.

CRIMINAL LAW — Venue of Crime. — Where one becomes a bailee in one county, and moves the property into another, and there appropriates it, jurisdiction is in either county.—People v. Mitchell N. Y, 61 N. E. Rep. 182.

CRIMINAL TRIAL — Convicted of Lesser Crime. — Where a defendant was indicted for one offense and convicted of a lesser crime, errors in instruction as to the first offense are harmless.—Braxton v. State, Ind., 61 N. E. Rep. 195.

DAMAGES —Appraisal of Damages. — In an action under St. 1894, ch. 309, to recover against the owner of dogs injuring sheep, that the certificate of appraisal of damages to sheep estimated damages to sheep owned by A and daughters, whereas A was sole owner, held not to defeat the action.—Johnson v. Griswold, Mass., 61 N. E. Rep. 214.

DAMAGES — Excluding Evidence in Mitigation. — The error in excluding evidence in mitigation of damages is not prejudicial, where the court remitted part of the damages recovered.—Myers v. Taylor, Tenn., 64 S. W. Rep. 719.

DAMAGES — Immaterial Error as to Charge for Punitive Damages.—Where the verdict returned was no more than compensatory damages for the life destroyed, an error in instructing the jury as to punitive damages was harmless.—Louisville & N. R. Co. v. Edmonds' Admx., Ky., 64 S. W. Rep. 727.

DAMAGES — Value of Leg. — A verdict f or $14,500 in an action by a servant against his master for loss of his foot and part of his leg below the knee should be reduced to $8,000.—Wimber v. Iowa Cent. Ry. Co., Iowa, 87 N. W. Rep. 505.

DEATH — Laches. — Under Rev. St. 1898, § 4219, 4224, subd. 3, an action brought by an administrator to recover damages for the death of his decedent by reason of defendant's default or neglect, four years after deceased's death, is barred.—Staeffler v. Menasha Wooden Ware Co., Wis., 87 N. W. Rep. 480.

DEEDS — Cancellation for Lack of Consideration. —Though there was no consideration for a deed, yet it will not be cancelled, in the absence of fraud or palpable mistake.—Raab v. Raab, Ky., 64 S. W. Rep. 624.

DESCENT AND DISTRIBUTION — Liability of Heir for Debts.—The heir is liable to the extent of assets received for the whole claim of a creditor of the ancestor.—Points v. Frank, Ky., 64 S. W. Rep. 637.

DIVORCE — Awarding Custody on Preference of Children.—Where a divorce was granted to the husband, it was error to award the wife the custody of the children of the marriage, two sons, aged 14 and 16, merely on their expression of preference.—Edwards v. Edwards, Ky., 64 S. W. Rep. 726.

DIVORCE — Conviction of Manslaughter. — Conviction of manslaughter held ground of divorce under Burn's Rev. St. 1894, §§ 1044, 1642, notwithstanding Rev. St. 1843, ch. 54, § 79, repealed by Rev. St. 185 , ch. 92, § 1.—Sutherlin v. Sutherlin, Ind., 61 N. E. Rep 206.

DOMICILE — Wife. — Domicile of wife presumed to be that of husband.—Cone v. Cone, S. Car., 39 S. E. Rep. 748.

EASEMENTS — Recognizing Avenue as Public Street.—Deed wherein grantor recognized an avenue as a public street held, as between the parties, to create an easement.—City of Niagara Falls v. New York Cent. & H. R. R. Co., N. Y., 61 N. E. Rep. 185.

EJECTMENT — Averring Mistake in Deed as Defense.—In an action to recover land, all averments as to mistake in defendant's deed held properly stricken from his answer, in the absence of any averment of notice to plaintiff.—Mayes v. Kenton, Ky., 64 S. W. Rep. 728.

ELECTIONS — Notice of Change of School District. —Because of failure to give comprehension of an election to change school district, the whole election is void.—School District v. Smith, Mo. App. (St. Louis, No. 8264), decided Nov. 5, 1901.

ELECTION OF REMEDIES — Damages. — Appellate court held unable to determine, in view of condition of record, whether plaintiff, suing in claim and delivery and also for conversion, and executing release of cause of action, waived property rights by electing to proceed for damages.—Hawkins v. Collins, S. Car., 39 S. E. Rep. 768.

EQUITY — Typewritten Report of Evidence to Jury.—Error in giving a typewritten report of an examination in chief to the jury on their retiring held not cured by later giving them the report of the cross-examination.—Crisman v. McMurray, Tenn., 64 S. W. Rep. 711.

ESTOPPEL — Representations in the Sale of Land. —Devisees, representing to purchaser that widow, selling land of he estate, had qualified as executrix, held estopped to claim the land o[illegible] she had not done so.—Davidson v. Kelly, Ky., 64 S. W. Rep. 628.

EVIDENCE — Declaration of Ancestor. — Declarations of an ancestor as to use or occupancy of land are admissible against those claiming under or in priority with him.—Kreckeberg v. Leslie, Wis., 87 N. W. Rep. 450.

EVIDENCE — Expert. — The sufficiency of the qualification of witnesses to testify as experts is within the discretion of the trial court.—Bowen v. Boston & A. R. Co., Mass., 61 N. E. Rep. 141.

EVIDENCE — Parol Variation of Written Contract. —The rule that parol evidence cannot be introduced to vary the terms of a written contract applies only as to the parties to the contract.—Central Coal & Coke Co. v. Good, Ind. T., 64 S. W. Rep. 677.

EVIDENCE — Parol Variation of Written Contrac . —Parol evidence is admissible to vary the terms of a written contract, where the controversy is between a stranger to the contract and a party to it.—Myers v. Taylor, Tenn., 64 S. W. Rep. 719.

EXECUTORS AND ADMINISTRATORS — Mortgage to Pay Debts.—Under Burns' Rev. St. 1894, §§ 2524, 2525, mortgage of realty by administrator to pay debts held valid, though incorporating clause waiving appraisement laws.—Smith v. Eels, Ind., 61 N. E. Rep. 200.

EXECUTORS AND ADMINISTRATORS — Orders of Distribution.—Under Code, §§ 226, 8261, 3265, action to secure an order on an administrator for a distributive share of an estate held properly placed on the probate docket.—Duffy v. Duffy, Iowa, 87 N. W. Rep. 500.

FIRE INSURANCE — Policy Issued Outside Territory of Agent.—Where a jury determines that a policy issued by an agent was not within his territory, the company is not liable for loss.—Insurance Co. of North America v. Thornton, Ala., 30 South. Rep. 614.

FORCIBLE ENTRY AND DETAINER —Possession and Title Necessary to Maintain Action.—One who had neither the possession of nor the title to land at the time an entry was made on it cannot, in consequence of a subsequent purchase, maintain a warrant for forcible entry, notwithstanding Ky. St. § 491.—Cuyler v. Estis, Ky., 64 S. W. Rep. 678.

FRAUDS, STATUTE OF — Part Performance. — Part performance of a contract void under the statute does not render it capable of enforcement in a court of law. —Kling v. Bordner, Ohio, 61 N. E. Rep. 148.

FRAUDULENT CONVEYANCES — Assignment of Insurance Policy.—The assignment by a debtor to his wife of a life insurance policy that has no vendible value is not fraudulent as to creditors.—Steeley's Creditors v. Steeley, Ky., 64 S. W. Rep. 642.

FRAUDULENT CONVEYANCES — Insurance Policy.— Assignment of insurance policy after loss, made as security, with reservation of benefit to assignor, held void as to creditors.—Truitt v. Crook, Ala., 30 South. Rep. 618.

GARNISHMENT — Charitable Institution. — A fund saved in the ordinary management of an insane asylum and appropriated for the construction of an industrial hall, not being indispensable to the support of the inmates of the asylum, is subject to attachment for the debts of the corporation.—Central Kentucky Asylum for Insane v. Hauns, Ky., 64 S. W. Rep. 643.

GUARDIAN AND WARD — Distribution to Ward Pending Litigation.—A judgment erroneously directing a guardian to distribute the estate pending litigation to his ward without a refunding bond will be

versed, though the litigation has since been determined favorably to the guardian.—Points v. Frank, Ky., 64 S. W. Rep. 637.

HIGHWAYS — Cost of Construction Charged on Abutting Property.—Cost of building the street at fixed grade held charge on abutting property, though cost of changing grade was not so.—Louisville Steam Forge Co. v. Mehler, Ky., 64 S. W. Rep. 652.

HOMICIDE — Instruction as to Self-Defense. — In a prosecution for homicide, wherein the defense of self-defense is interposed, the refusal to instruct that the state must show beyond all reasonable doubt that accused was not acting in self-defense held reversible error.—State v. Bone, Iowa, 87 N. W. Rep. 507.

HOMICIDE — Provocation. — That accused was informed of an indecent assault by deceased on his wife held not sufficient provocation to reduce the homicide to manslaughter.—State v. Bone, Iowa, 87 N. W. Rep. 507.

HUSBAND AND WIFE — Mortgage of Wife's Property.—A mortgage on a wife's separate property, executed to secure the repayment of money borrowed to discharge a lien thereon, is valid.—Till v. Collier, Ind., 61 N. E. Rep. 208.

HUSBAND AND WIFE — Proof of Loan by Wife to Husband.—The burden is on the wife of a debtor who asserts a claim on account of money furnished to the husband as agent to show that the money was her separate estate.—Kugler v. Rouss, Ky., 64 S. W. Rep. 627.

INDIANS — Half Breeds as Subject to Taxation. — One whose father is white and a naturalized citizen held not an Indian for purpose of taxation, though his mother is a half-breed and the son goes with her to an Indian reservation.—United States v. Higgins, U. S. C. C., D. Mont., 110 Fed. Rep. 609.

INFANTS — Errors of Attorney. — The interest of a minor will be examined on appeal, without regard to errors committed by her attorney in preparing exceptions.—Barrett v. Moise, S. Car., 39 S. E. Rep. 755.

INJUNCTION — Contempt. — Acts done after granting injunction conditioned on giving bond, but before bond is given, do not constitute contempt.—*Ex parte* Miller, Ala., 30 South. Rep. 611.

INSANE PERSONS — Agreement to Construe Will Void.—A decree construing a will, entered by the consent of the beneficiaries, is voidable, where one of the beneficiaries was mentally incompetent to approve the same.—Glascock v. Tate, Tenn., 64 S. W. Rep. 715.

INTERNAL REVENUE — Assignment of Insurance Policy Need not be Stamped.—It seems that the revenue act of congress in force July 1, 1898, did not require a revenue stamp to be affixed to an assignment of an insurance policy.—Steeley's Creditors v. Steeley, Ky., 64 S. W. Rep. 642.

INTOXICATING LIQUORS — Assessment of Liquor Traffic.—Assessment on liquor traffic under Rev. St. §§ 4364-9, held valid, though it be carried on in violation of ordinace.—Conwell v. Sears, Ohio, 61 N. E. Rep. 155.

INTOXICATING LIQUORS — Question of Agency for Jury.—Where defendant testified that he did not sell the liquor he was charged with selling, but acted merely as agent for the buyer, the question whether he did so was for the jury.—Baker v. Commonwealth, Ky., 64 S. W. Rep. 657.

JUDGES — Authority of Special Judge. — Final decree awarding injunction held termination of authority of special judge under Burns' Rev. St. 1894, § 419, so as to preclude subsequent entertaining by him of contempt proceedings.—Kissel v. Lewis, Ind., 61 N. E. Rep 209.

JUDGMENT — Opening Default Judgment. — The court properly refused to open a default judgment to permit defendant to file an answer, where she offered no sufficient reason for failing to make defense sooner.—Johnson v. Bush, Ky., 64 S. W. Rep. 628.

JUDGMENT — Vacating. — Every court can vacate a void decree, even at a subsequent term.—Chamblee v. Cole, Ala., 30 South. Rep. 680.

JURY — Application for Order on Administration. —An application for an order on an administrator as to the distribution of an estate is not triable by jury.—Duffy v. Duffy, Iowa, 87 N. W. Rep. 500.

LANDLORD AND TENANT — Adverse Possession of Tenant.—Adverse possession of a tenant held to begin when the landlord has notice of the tenant's adverse claim.—Greenwood v. Moore, Miss., 30 South. Rep. 609.

LANDLORD AND TENANT — Lease on Shares. —Under a contract by which parts of a farm are rented to a tenant for a cash rent, and he is employed to cultivate other parts, for which he is to be paid two-thirds of the crops raised, the crops belong to the landowner until division.—Gifford v. Meyers, Ind., 61 N. E. Rep. 210.

LARCENY — Kleptomania as a Defense. — An instruction, in a prosecution for larceny, on the issue of kleptomania as a defense, held improper.—State v. McCullough, Iowa, 87 N. W. Rep. 503.

LIBEL AND SLANDER — Charging Public Officers With Corruption.—Publication charging public officers with corruption in awarding contract held libelous *per se*.—Wofford v. Meeks, Ala., 30 South. Rep. 625.

LICENSES — Tax on Business of Buying Claims.—City ordinance requiring payment of license tax for the privilege of buying claims held void to the extent that it requires person to pay tax for the privilege of buying claims for himself and not as a broker.—Gast v. Buckley, Ky., 64 S. W. Rep. 632.

LIFE INSURANCE — Subagents. — Insurance agent held to have implied authority under terms of appointment to appoint subagents to receive applications and fix premiums.—Insurance Co. of North America v. Thornton, Ala., 30 South. Rep. 614.

LIFE INSURANCE — Vested Interest of Beneficiary. —Wards of guardians who took out life insurance policy in their names, held to take a vested right of property therein.—Herring v. Sutton, N. Car., 39 S. E. Rep. 772.

LIMITATIONS OF ACTIONS — Action by Remainder-Man.—Action by remainder-men to recover land brought within 15 years from the death of life tenant, is not barred.—Davidson v. Kelley, Ky., 64 S. W. Rep. 623.

MANDAMUS — Discretion of Circuit Judge. — The supreme court will not interfere by *mandamus* to control the discretion of a circuit judge in granting an injunction, unless the error is plain. — Stenglein v. Beach, Mich., 87 N. W. Rep. 449.

MANDAMUS — Remedy in Equity.—That plaintiff may have a remedy in equity does not preclude him from *mandamus*, though that fact may influence the court's discretion.—People v. New York Cent. & H. R. R. Co., N. Y., 61 N. E. Rep. 172.

MANDAMUS — To Compel Entry of Fees in Probate Proceeding.—*Mandamus* will not lie against the clerk of the county court to compel the entry on the probate fee book of sheriff's fees in a guardianship proceeding in such court.—Shrewsbury v. Ellis, Tex., 64 S. W. Rep. 700.

MASTER AND SERVANT — Assumption of Risk.—An employee who has worked with another in a quarry for 14 years in blasting assumes the risk.—Wiskie v. Montello Granite Co., Wis., 87 N. W. Rep. 461.

MASTER AND SERVANT — Injury to Lineman of Electrical Company.—The efficacy and use of a magnetic bell and set furnished to a lineman by a telephone company held to be a question for the jury, in a suit by the lineman for injuries.—Jackson & S. St. R. R. v. Simmons, Tenn., 64 S. W. Rep. 705.

MASTER AND SERVANT — Master Delegating His Duty.—A master cannot relieve himself from liability for the negligent performance of a positive duty which he owes to a servant, in respect to the safety of

the place where the servant is required to work, by delegating such duty to others.—*In re* California Nav. & Imp. Co., U. S. D. C., N. D. Cal., 110 Fed. Rep. 670.

MASTER AND SERVANT — Mine Boss Transferring Duties to Employee.—Where mine boss enjoins performance of his duties upon a miner, such miner stands in relation to the other miners as the mine boss.—Wellston Coal Co. v. Smith, Ohio, 61 N. E. Rep. 143.

MASTER AND SERVANT — Negligence of Servant.—Train dispatcher's right to cross tracks of defendant railroad company at one place, held not to give him the right to go between cars at another place.—Louisville & N. R. Co. v. Hocker, Ky., 64 S. W. Rep. 638.

MECHANICS' LIENS — Sufficiency of Petition.—A petition in proceedings to foreclose a mechanic's lien held insufficient, in failing to set out that the required steps were taken by claimant.—Rhodes v. Jones, Tex., 64 S. W. Rep. 699.

MECHANICS' LIENS.—Taking Chattel Mortgage.—Taking of a chattel mortgage on machinery, which is to be made a fixture, before such time, held not to bar the seller from asserting a mechanic's lien for unpaid price.—Phœnix Mfg. Co. v. McCormick Harvesting Mach. Co., Wis., 87 N. W. Rep. 458.

MECHANICS' LIENS — Wife's Right to Allege Invalidity of Lien.—A wife not estopped from alleging the invalidity of a mechanic's lien on homestead by a written waiver of the failure to perform the building contract, executed by the husband.—Rhodes v. Jones, Tex., 64 S. W. Rep. 699.

MORTGAGES — Need of Trustee.—Where a surety on notes was himself secured by a mortgage, and he paid the notes, he need not have the mortgage assigned to a trustee to enforce it.—Burnett v. Sledge, N. Car., 39 S. E. Rep. 775.

MUNICIPAL CORPORATIONS — Election to Ratify Water Contract.—Election to ratify water contract, held at two voting places on due notice and voters generally participating therein, held not invalid, though statute requires such elections to be held in four voting places.—City of Harrodsburg v. Harrodsburg Water Co., Ky., 64 S. W. Rep. 658.

MUNICIPAL CORPORATIONS — Injury to Pedestrians.—One passing the barricades at a ditch in a highway and sustaining injuries held not entitled to recovery, though the city knew of a practice of crossing the planks.—City of Meridan v. Stainback, Miss., 30 South. Rep. 607.

NAVIGABLE WATERS — Control of Municipality.—Rights of state or city of New York, as trustee for the public, to the tideway of Harlem river, do not extend to purposes not connected with navigation or commerce.—*In re* City of New York, N. Y., 61 N. E. Rep. 158.

NAVIGABLE WATERS — Forfeiture of Grant.—The state alone can raise the question of forfeiture of a grant by the state to riparian owner of lands.—White v. Nassau Trust Co., N. Y., 61 N. E. Rep. 169.

NEGLIGENCE — Elevated Bins.—Where elevated bins holding crushed stone gave way, damaging a scow beneath, the burden was on the owners of the bins to show freedom from negligence.—Hastorf v. Hudson River Stone Supply Co., U. S. D. C., S. D. N. Y., 110 Fed. Rep. 669.

NEGLIGENCE — Failure to Look and Listen.—The failure to look and listen for a train at a street crossing is not *per se* negligence, where the railroad company keeps a watchman and gates at the crossing and the gates are up.—Dick v. Louisville & N. R. Co., Ky., 64 S. W. Rep. 725.

NEW TRIAL — Erroneous Instruction.—A new trial will be granted for an instruction erroneously presenting the law, without inquiry as to what other ground the verdict may have been based on.—Daniels v. Florida Cent. & P. R. Co., S. Car., 39 S. E. Rep. 762.

169. OFFICERS—Title to Office in Equity.—The title to an office cannot be tried and determined in a court of chancery.—Stenglein v. Beach, Mich., 87 N. W. Rep. 449.

PARENT AND CHILD—Right of Father to Custody of Child.—A father's right, under Gen. St. 1894, § 4540, to control the custody of his minor children, is not absolute; and, in a controversy between the parents as to their custody, the children's welfare will be given controlling consideration.—State v. Greenwood, Minn., 87 N. W. Rep. 489.

PAYMENT — Application.—Where a debtor gives no instructions as to the application of a payment until after the credits have been entered, the creditor can apply it where he chooses.—Burnett v. Sledge, N. Car., 39 S. E. Rep. 775.

PERSONAL INJURIES — Evidence.—Refusal to permit plaintiff, who was struck by a street car, to testify that he had gone on the track to avoid an unruly horse, held proper under condition of evidence.—Floyd v. Paducah Railway & Light Co., Ky., 64 S. W. Rep. 653.

PHYSICIANS AND SURGEONS — Items in Doctor's Bill.—In an action by physician for medical services, it is error to charge that the jury are not confined to items shown by bill of particulars.—Morrisett v. Wood, Ala., 30 South. Rep. 630.

PLEADING — Defects.—In the absence of a demurrer to defects in a complaint, defendant will be deemed to have waived the same.—Cook v. American Exch. Bank, N. Car., 39 S. E. Rep. 746.

PLEADING — List of Items.—In action on an account, defendant is entitled on proper demand to a list of the items.—Morrisett v. Wood, Ala., 30 South. Rep. 630.

PLEADING — Plea in Abatement.—Plea of abatement for defect of parties must give their names and show them to be within the jurisdiction.—Cone v. Cone, S. Car., 39 S. E. Rep. 748.

PLEADING — Sufficient Complaint.—Under Rev. St. 1899, § 2668, a complaint containing necessary substance to make a cause of action is good.—Benolkin v. Guthrie, Wis., 87 N. W. Rep. 466.

PLEADING — Waiving Defect of Parties.—Where the court sustained a special demurrer to the petition for defect of parties, and defendant then filed only a general demurrer to the petition as amended, any defect of parties was waived.—Walton v. Washburn, Ky., 64 S. W. Rep. 634.

QUIETING TITLE — Action by One in Adverse Possession.—One who has been in adverse possession of land for 15 years may maintain an action to quiet title.—Vallandingham v. Taylor, Ky., 64 S. W. Rep. 725.

QUO WARRANTO — Corporations Domiciled in Different Counties.—Under Acts 1900, p. 125, ch. 88, § 3521, the circuit court of one county held to have no jurisdiction in *quo warranto* proceedings against numerous corporations domiciled in various counties.—State v. Mississippi Cotton Oil Co., Miss., 30 South. Rep. 609.

RAILROADS — Lessor Responsible for Torts of Lessee.—A railroad corporation, leasing its road without direct legislative authority, is responsible for the torts of its lessee, though it surrenders complete control of the leased road.—Louisville & N. R. Co. v. Breeden's Admx., Ky., 64 S. W. Rep. 667.

RAILROADS — License.—Persons using roadbed as footway in accordance with public habit, acquiesced in by company, held a licensee, and not a trespasser.—Jones v. Charleston & W. C. Ry. Co., S. Car., 39 S. E. Rep. 778.

RECEIVERS — Liability for Rent of Premises in Charge.—A receiver having surrendered possession of leased premises occupied by him pending the receivership, held not liable for rent accruing thereafter.—Johnston v. Amos, Iowa, 87 N. W. Rep. 491.

RELEASE — Consideration.—Release of defendant

from pending suit for conversion of chattels by attachment, in consideration of return of chattels, held based on valuable consideration only in case defendant was lawfully entitled to property.—Hawkins v. Collins, S. Car., 39 S. E. Rep. 768.

SALES — Conditional Sale.—Agreement by purchaser of goods at attachment sale with debtor to take charge of stock as "manager and agent," and have complete title whenever his debt and costs and purchase money should be paid, held not a conditional sale to debtor, so as to defeat purchaser's right to possession on debtor's abandonment of contract.—Kugler v. Rouss, Ky., 64 S. W. Rep. 627.

SHERIFFS AND CONSTABLES — Seizing Crops for Rent.—Constable, seizing crops for rent, claimed by third person to be due him, may set up landlord's title in defense to third person's action.—Creswell v. Smith, S. Car., 39 S. E. Rep. 757.

SHIPPING — Explosion of Steam Drum.—The explosion of a steam drum on a steamer, by which passengers were injured, is *prima facie* evidence of negligence on the part of the carrier in a proceeding to recover for such injuries.—*In re* California Nav. & Imp. Co., U. S. D. C., N. D. Cal., 110 Fed. Rep. 670.

SPECIFIC PERFORMANCE — Failure to Make Payments.—A purchaser of land under a contract providing for forfeiture on failure to make payments held entitled to specific performance of the contract, where forfeiture was not declared on default of payment.—Burroughs v. Jones, Miss., 30 South. Rep. 605.

STATUTES — Special Act.—Act Feb. 17, 1899, dispensing with the necessity of an allegation or proof of the absence of contributory fault on plaintiff's part in actions on account of negligence causing personal injury or death, held not in conflict with Const. art. 4, §§ 22, 23, as being a special act.—Indianapolis St. Ry. Co. v. Robinson, Ind., 61 N. E. Rep. 197.

STREET RAILROADS — Presumption as to Those on Track.—In action against street railroad for injuries from collision, an instruction held erroneous for not stating that a motorman has a right to presume one on the track will leave it before the car reaches him.—Citizens' St. R. Co. v. Shepherd, Tenn., 64 S. W. Rep. 710.

TAXATION — Plan of Taxation of Money in the Hands of Agent.—Money in the hands of an agent is taxable at the residence of the principal, and not at the residence of the agent.—O'Callighan's Exrs. v. City of Owensboro, Ky., 64 S. W. Rep. 619.

TAXATION — Recovery of Taxes of Property of Decedents.—Under Code, § 1374, action may be brought to recover taxes on property of decedent omitted from assessment as long as his representative has funds on hand.—Galusha v. Wendt, Iowa, 87 N. W. Rep. 512.

TENANCY IN COMMON — Sale by Co-tenant of Right to Cut Logs.—A co-tenant cannot sell the right to cut logs from the land owned in common, so as to pass the legal title to the purchaser; and the interest which the purchaser acquires can be asserted only in equity.—Burt & Brabb Lumber Co. v. Clay City Lumber Co., Ky., 64 S. W. Rep. 652.

TENANCY IN COMMON—Trespass of Licensee of Co-tenant.—A tenant in common held entitled to maintain trespass against licensee of his co-tenant.—Sullivan v. Sherry, Wis., 87 N. W. Rep. 471.

TRADE-MARKS AND TRADE-NAMES — Brands of Whiskies.—A complainant held entitled to a preliminary injunction against unfair competition by the simulation of certain brands of whiskies of which it had become the owner by purchase.—Kentucky Distilleries & Warehouse Co. v. Wathen, U. S. C. C., W. D. Ky., 110 Fed. Rep. 641.

TRESPASS — Land of Trustee.—Creditors of party held liable for permitting others to trespass on land held by a trustee of such party for benefit of such creditors.—Cook v. American Exch. Bank, N. Car., 39 S. E. Rep. 746.

TRESPASS — Sale of Land by Plaintiff After Acts of Trespass.—The fact that plaintiffs in an action to recover damages for trespass upon land had sold the land after the acts complained of did not defeat their rights of action.—Shaw v. Robinson, Ky., 64 S. W. Rep. 620.

TRIAL — Directing Verdict.—Where all the evidence in a case is record evidence, and there is no testimony to impugn the facts appearing of record, it is proper to direct a verdict.—Barrett v. Moise, S. Car., 39 S. E. Rep. 755.

TRIAL — Peremptory Instruction for Defendant.—A peremptory instruction for defendant should not be given, though defendant may prove the facts to be different from those testified to by plaintiff's witnesses, and to such an extent that the trial court would set aside a verdict for plaintiff.—Dick v. Louisville & N. R. Co., Ky., 64 S. W. Rep. 725.

TRIAL — Verdict Vitiated by Statements in Jury Room.—Where a verdict was vitiated by reason of statements of evidence made in the jury room, the trial court had no power to determine that there was sufficient evidence, independent of such statements, to support the verdict.—Jackson & S. St. R. R. v. Simmons, Tenn., 64 S. W. Rep. 705.

TROVER AND CONVERSION — Title.—Where plaintiff waives property rights and sues for conversion of chattels, and defendant denies wrongful conversion, title does not vest in defendant until judgment in his favor.—Hawkins v. Collins, S. Car., 39 S. E. Rep. 768.

TRUSTS — Appointment of Trustee by Equity.—Equity held to have power to appoint trustee on disagreement between beneficiaries.—Cone v. Cone, S. Car., 39 S. E. Rep. 748.

TRUSTS — Death of Trustee.—On the death of a trustee the title to the trust property descends to his eldest son.—Cone v. Cone, S. Car., 39 S. E. Rep. 748.

TRUSTS — Venue for Appointment of Trustee.—Petition for appointment of trustee need not be brought in county where land lies.—Cone v. Cone, S. Car., 39 S. E. Rep. 748.

USURY — Defense Must be Pleaded.—The defense of usury must be pleaded when the petition fails to show that there was any usury embraced in plaintiff's demand.—Maize v. Bradley, Ky., 64 S. W. Rep. 655.

VENDOR AND PURCHASER — Suit to Recover Property on Default of Vendee.—When real property on which a vendor's lien is reserved in the purchase money notes is sought to be recovered after the default of the vendee, the plaintiff may show that the vendee has recently recognized his obligation on the notes.—Ellis v. Hannay, Tex., 64 S. W. Rep. 684.

WILL — Contract to Leave Property by Will.—Contract to leave real estate to another by will must be in writing and contain a definite identification of the property.—Kling v. Bordner, Ohio, 61 N. E. Rep. 148.

WILLS — Legatees' Right to Interest of Specific Bequest.—A bequest of $2,000 out of the proceeds of certain notes when collected was a bequest of specific personal property, and not of money, and the legatee is entitled to interest from the testator's death, notwithstanding Ky. St. § 2065.—Piper's Exr. v. Adair, Ky., 64 S. W. Rep. 645.

WITNESSES — Credibility.— Evidence in a seduction prosecution, tending to affect credibility of the defendant's wife as a witness, held admissible.—Hinkle v. State, Ind., 61 N. E. Rep. 196.

WITNESSES — Redirect Examination.—Questions on redirect examination of a witness called to rebut evidence showing deceased to have been quarrelsome held proper.—State v. Bone, Iowa, 87 N. W. Rep. 507.

WORK AND LABOR — No Expectation of Compensation.—Where party performing services had no intention to claim compensation, no recovery can be had on the *quantum meruit*.—Columbus, H. V. & T. Ry. Co. v. Gaffney, Ohio, 61 N. E. Rep. 152.